

EXHIBIT B

Atkinson Baker, a Veritext Company
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELLIOT MCGUCKEN, an
individual,

Plaintiff,

vs.

NEWSWEEK, LLC, a New
York Limited Liability
Company; and DOES 1-10,
inclusive,

Defendants.

----- X

CERTIFIED COPY

Civil Action No.:
1:19-cv-09617-KPF

C O N F I D E N T I A L

30(b)(6) ZOOM VIDEOCONFERENCE DEPOSITION OF
NEWSWEEK DIGITAL, LLC

BY AND THROUGH

DIANE RICE

NEW JERSEY

MARCH 10, 2021

ATKINSON-BAKER,
a VERITEX COMPANY
Telephone: 1-800-288-3376
www.depo.com

REPORTED BY: Amelinda Lopez, RPR, CCR #30XI00229700

FILE NO.: AE08879

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1 UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF NEW YORK

3
4 ELLIOT MCGUCKEN, an)
individual,)

5)
6 Plaintiff,)

7 vs.)

8 NEWSWEEK, LLC, a New)
York Limited Liability)
Company; and DOES 1-10,)
9 inclusive,)

10 Defendants.)

11 -----X

12
13
14 Zoom videoconference deposition of DIANE
15 RICE, taken on behalf of the Plaintiff, commencing
16 at 1:00 p.m., Wednesday, March 10, 2021, before
17 Amelinda Lopez, RPR, CCR No. 30XI00229700.

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2

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1

I N D E X

2

3

WITNESS: DIANE RICE

4

Examinations

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25 New Jersey; March 10, 2021; 1:00 p.m.

2 -- -- --

4 D I A N E R I C E, having first
5 been duly sworn, testified as follows:

7 EXAMINATION

8 BY MR. BURROUGHS:

9 Q. Hello, Ms. Rice. Would you please
10 state your name for the record?

11 A. Diane Rice.

12 Q. Is it R-I-C-E?

13 A. Yes, R-I-C-E.

14 Q. Okay. Are you currently employed?

15 A. Yes.

16 Q. And what's your current employment?

17 A. I'm director of photography for
18 Newsweek.

19 Q. Okay. Do you hold any other
20 employment currently?

21 A. Not currently.

22 Q. Okay. How long have you worked at
23 Newsweek?

24 A. Over three years now.

25 Q. Have you always had that same title,

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1 director of photography?

2 A. As long as I've been with Newsweek,
3 I've been a director of photography.

4 Q. Okay. Prior to working with
5 Newsweek, were you employed?

6 A. Yes.

7 Q. Where were you employed?

8 A. I was working with Manifest, which
9 is a creative agency prior to Newsweek.

10 Q. Okay. Is that an editorial agency,
11 a commercial agency, or something else?

12 A. It was commercial.

13 Q. Okay. And how long did you work
14 there for?

15 A. I worked with them for just over a
16 year.

17 Q. And prior to working there, where
18 did you work?

19 A. I worked for Washingtonian in D.C.

20 Q. Okay. And what was your title in
21 that position?

22 A. I was a photo director.

23 Q. And how long did you work there?

24 A. Just over three years.

25 Q. Okay. And what was your title in

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1 working at Manifest?

2 A. Photo editor.

3 Q. And did you go to college?

4 A. I did.

5 Q. Where did you go to college?

6 A. I went to Nassau Community for two
7 years and Long Island University to finish my
8 degree.

9 Q. Okay. And what was your degree?

10 A. Mixed concentration in graphic
11 design and photography.

12 Q. Other than that degree, do you have
13 any training, formal or otherwise, relating to
14 photography?

15 A. No, just my experience as a photo
16 editor.

17 Q. Okay. Do you have any training,
18 formal or otherwise, other than your experience
19 as an editor in applying editorial guidelines?

20 A. Just as a photo editor.

21 Q. Okay. Have you ever had any legal
22 training that's relevant to your role as a
23 photo editor?

24 A. Not outside of the Getty session.

25 Q. Okay. And have you had a Getty

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1 session?

2 A. Yes.

3 Q. Okay. When was that?

4 A. It was 2019.

5 Q. Can you estimate for me the month?

6 A. I believe that was in November.

7 Q. Okay. Was that in person or online?

8 A. It was in person.

9 Q. Okay. And where was it?

10 A. It was held in our offices.

11 Newsweek.

12 Q. Can you estimate for me how many
13 people were in attendance?

14 A. It's slightly difficult to estimate
15 since some people dialed in, so I couldn't say
16 how many people dialed in. But in the room,
17 there was probably at least 30, maybe more.
18 I'm not sure.

19 Q. Okay. Do you know if it was
20 required that Newsweek staff attend the
21 meeting?

22 A. It was. I believe so.

23 Q. Okay. Have you ever had your
24 deposition taken before?

25 A. No, I have not.

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1 Q. Okay. Have you ever had occasion to
2 obtain a personal lawyer for any purpose?

3 A. No, I never had a need.

4 Q. Are you represented by counsel
5 today?

6 A. If you would count the counsel in
7 the room, I would suppose. Yeah.

8 Q. Okay. Are you referring to
9 Ms. Gates and Ms. Wolff?

10 A. I am.

11 Q. Okay. Do you recall when you first
12 spoke with either Ms. Gates or Ms. Wolff?

13 A. I believe it might have been on an
14 e-mail correspondence in 2019, but I'm not
15 sure.

16 Q. Okay. When is the first time you
17 can recall communicating with Ms. Gates or
18 Ms. Wolff?

19 A. That would be about a month or so
20 ago.

21 Q. Okay. And prior to that, had you
22 had any interaction with any other attorneys
23 working for or representing Newsweek?

24 A. Not that I'm aware of.

25 Q. Do you recall ever speaking with

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1 anyone other than your attorneys about the
2 dispute that we're talking about today?

3 A. Yes.

4 Q. Okay. And who did you speak with
5 other than your attorneys regarding this
6 dispute?

7 A. That would be Yuliya, one of our
8 business associates.

9 Q. Okay. Do you mind spelling her name
10 for us?

11 A. I'd need to pull it up in my e-mail.
12 I'm not a good speller.

13 Q. No problem. Okay. Well, this
14 actually ducktails into a couple of the ground
15 rules. So let me go over those with you since
16 you have not had your deposition taken before.

17 You know, there may come times during
18 today's proceedings where I will ask you for
19 spellings for the record. That is primarily
20 for Madam Court Reporter to make sure that when
21 she transcribes what you're saying, she's
22 transcribing it accurately. To that end, it's
23 also important for you and I to allow each
24 other to finish before we answer because that
25 will allow for a more clear transcription and

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1 it also requires us to use language such as
2 "yes" and "no" as opposed to visual cues such
3 as head nods or shakes or guttural responses
4 like uh-huhs and huh-uhs.

5 Does that make sense?

6 A. Understood.

7 Q. Okay. And the transcript is going
8 to be sent to you after this session for your
9 review and you will have the opportunity to
10 review it and make revisions. However, to the
11 extent that you make a revision that's
12 substantial or substantive such as a yes to a
13 no or blue to a red, I'll be able to comment on
14 that when this case goes to trial and that may
15 impact your credibility in front of the jury.
16 So it's very important that if I ask the
17 question and you answer it, you know, you don't
18 do so until you understand the question.

19 Okay?

20 A. Understood.

21 Q. Okay. So if I ask the question and
22 you answer it, I'm going to assume that you
23 understood the question. Is that fair?

24 A. Yes.

25 Q. Okay. And throughout the day, I may

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1 be asking you for estimates such as dates or
2 amounts or measurements, things of that nature,
3 and, you know, I don't want you to guess in
4 response to those questions, but I am entitled
5 to your best estimate. So if I were to ask
6 you, you know, how many days have you worked at
7 Newsweek, you may not have that number handy
8 but given your experience, you'll be able to
9 give me an estimate.

10 If I ask you how long I've worked in
11 my law firm, you would have to guess because
12 you don't know anything about that particular
13 location for me.

14 Does that make sense?

15 A. Yes.

16 Q. Okay. And at certain points during
17 the proceedings, your attorneys may interpose
18 objections. Now, unless they instruct you not
19 to answer, those are simply for the record, so
20 you should allow the court reporter to write
21 those objections down or type them as the case
22 may be and then provide a response.

23 Does that make sense?

24 A. Yes.

25 Q. Okay. Now, is there any reason why

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1 you wouldn't be able to give me your best
2 testimony today? Any illnesses or drugs or
3 alcohol in the last 24 hours or anything like
4 that?

5 A. No.

6 Q. Okay. So as the director of
7 photography at Newsweek, what are your
8 day-to-day obligations?

9 A. Typically, I'm working with the
10 magazine staff, so I'm pulling images for news
11 stories that would be running in the magazine.
12 Make sure I'm downloading the licenses with
13 those images. Tracking the information that
14 goes along with the photos so that our
15 reporters can access that information and make
16 proper captions. Adding photo credits and just
17 double-checking to make sure there's no
18 misspellings and things like that in reference
19 to the visuals.

20 Q. Okay. When you say that part of
21 your job is pulling images, what do you mean by
22 that?

23 A. Usually a stock research typically
24 or requesting images from, you know, sources.

25 Q. When you say you're doing stock

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1 work, what do you mean by that?

2 A. Going to stock sites like Getty.

3 Q. Do you currently work with Getty in
4 your role at Newsweek?

5 A. Yes, I do.

6 Q. Okay. Do you work with any other
7 stock agencies aside from Getty?

8 A. Typically, it is -- Getty is our
9 main subscription.

10 Q. Okay. Are there any others that
11 you're working with now?

12 A. We're starting to add AP, but I'm
13 not sure if that deal has been finalized.

14 Q. Are there any others that you were
15 working with in 2020?

16 A. Not in 2020.

17 Q. Are there any others that you were
18 working with in 2019?

19 A. Not in 2019.

20 Q. Were you working with Getty in 2019?

21 A. Yes.

22 Q. Okay. Was Newsweek working with
23 Getty when you joined the company?

24 A. Yes.

25 Q. Okay. And one other ground rule

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1 just so we're on the same page is that
2 throughout the proceedings I'm going to be
3 referring to "you" and "your" in connection
4 with my questions, and when I do so, do you
5 understand I'm referring to Newsweek, the
6 company?

7 A. I do now.

8 Q. Okay. So you're speaking on behalf
9 of Newsweek. Do you understand that?

10 A. Yes.

11 Q. Okay. Now, do you currently obtain
12 photographs from anywhere other than Getty?

13 A. Yes, when necessary.

14 Q. Okay. What sources do you recall
15 pulling images other than Getty?

16 A. I would say like Netflix or HBO or
17 things that might be related to video content.

18 Q. Okay. So when you're pulling
19 Netflix photographs, for example, where are you
20 pulling those from?

21 A. Up from the PR site. I have access
22 to the PR images.

23 Q. Is that the same for HBO?

24 A. Yes.

25 Q. Is that the same for the other media

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1 companies with which you work?

2 A. Yes, it would be.

3 Q. Okay. So aside from Getty and the
4 media PR sites, are you sourcing images from
5 anywhere else currently?

6 A. Yeah, for doing a story on a
7 specific person, we might request that they
8 send us images.

9 Q. Sometimes you may request the
10 subject provide a key art or image for a story?

11 A. Correct.

12 Q. Okay. Do you have an understanding
13 of the term "key art"?

14 A. Yes.

15 Q. What does that mean to you?

16 A. Typically a key art is in reference
17 to like a movie or movie cover. News cover.

18 Q. Does the word "hero image" mean
19 anything to you?

20 A. We would use that in reference to
21 the lead image to a story.

22 Q. So if Newsweek did a piece and there
23 was a photograph at the top beneath the URL,
24 would that be the hero image?

25 A. I would call that a hero image, yes.

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1 Q. Has Newsweek ever published any
2 photographs that you've created?

3 A. Personally, no. Not that I'm --

4 Q. Are you aware of Newsweek -- are you
5 aware of Newsweek ever posting or publishing
6 any photographs that any of its staff created?

7 A. Yes.

8 Q. When was the last time that you can
9 recall that happening?

10 A. I would say maybe three months ago.
11 I know there was a reporter that had taken an
12 image I think of a particular brand in his
13 closet.

14 Q. Okay. Can you recall any other
15 examples?

16 A. Not off the top of my head I cannot.

17 Q. Okay. So as you sit here today, you
18 can recall one instance in which one reporter
19 provided a photograph for a story on Newsweek,
20 but cannot recall any other instances in which
21 Newsweek published a photograph created by a
22 staff member. Is that fair to say?

23 A. That's fair, yes.

24 Q. Okay. Does Newsweek currently
25 employ any photographers?

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1 A. No, they do not.

2 Q. In your tenure there has Newsweek
3 ever employed a photographer?

4 A. Not since I've been with the
5 magazine. We've commissioned photographers,
6 but we don't employ staff photographers.

7 Q. When was the last time you recall
8 Newsweek commissioning a photographer for a
9 Newsweek project?

10 A. That would have probably -- that
11 would have been over the summer, I believe.

12 Q. Okay. And do you recall the
13 substance of that project?

14 A. I think it was in -- I'm sorry,
15 actually, I'm sorry. Let me backtrack. There
16 was a more recent image for someone receiving a
17 medal of the arts that we commissioned. Or
18 rather the photographer came to us and let us
19 know that he was doing -- he was going to be
20 photographing a specific person receiving a
21 medal and we agreed to publish the images.

22 Q. Was that a pitch?

23 A. It was a pitch, yes. And we picked
24 it up prior to the images being shot.

25 Q. Okay. Can you estimate for me what

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1 percentage of photographs that have appeared on
2 the Newsweek site during your tenure are from
3 Getty as opposed to from either a third-party
4 commissioned photographer or a staff
5 photographer or someone else?

6 A. Specifically news images? As Getty
7 images versus commissioned images you're
8 asking?

9 Q. Or images created by staff even if
10 they're not photographers like the reporter
11 that you indicated earlier?

12 A. I would say 99 percent of the images
13 are from Getty, maybe even more.

14 Q. Okay. Does or has Newsweek -- let
15 me withdraw the question.

16 In your tenure at Newsweek, has
17 Newsweek ever pulled photos from social media?

18 A. Yes.

19 Q. Okay. Can you estimate for me how
20 many times that has happened in your tenure?

21 A. That would be difficult to estimate.
22 I'm really not sure.

23 Q. Would it be more than 25?

24 A. I'm sorry, I really couldn't
25 estimate.

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1 Q. Would it be more than five?

2 A. I'm sorry, I really couldn't
3 estimate.

4 Q. So as you sit here today, you have
5 no understanding or ability to estimate the
6 number of social media photographs that were
7 pulled for use on the Newsweek site; is that
8 correct?

9 A. Yes.

10 Q. Are you aware of that happening at
11 least once?

12 A. Yes.

13 Q. Okay. And is that the photograph by
14 Mr. McGucken that we're here to talk about
15 today?

16 A. I think we're talking about two
17 slightly different things. If you can clarify
18 embedding an image versus using an image that
19 we had permission to use in social media.

20 Q. Okay. When I refer to Newsweek
21 displaying an image, I'm referring to the image
22 actually appearing for viewing by the public at
23 Newsweek.com.

24 Does that make sense?

25 A. Yes.

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1 Q. Okay.

2 MS. WOLFF: Objection.

3 BY MR. BURROUGHS:

4 Q. So, you know, from my -- for most of
5 my questions, there's not going to be a
6 distinction between whether or not it was
7 uploaded directly as opposed to embedded. My
8 question is going to address the photos that
9 are displayed and visible on Newsweek.com.

10 Does that make sense?

11 MS. WOLFF: Objection. That's a
12 legal definition.

13 BY MR. BURROUGHS:

14 Q. Does that make sense?

15 A. Yes.

16 Q. Okay. So going back to my question:
17 Is the instance in which Newsweek displayed
18 Mr. McGucken's photograph the only time that
19 you can recall Newsweek pulling a photograph
20 from social media?

21 A. No.

22 MS. WOLFF: Objection to form.

23 A. Sorry.

24 Q. Can you identify for me the other
25 photograph that you remember being pulled from

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1 social media for display on Newsweek?

2 A. Not off the top of my head.

3 Q. Okay. So as you sit here today, the
4 only time that you can ever recall Newsweek
5 displaying a photograph that it pulled from
6 social media is the McGucken photograph that
7 we're talking about today, correct?

8 MS. WOLFF: Objection to form.

9 A. It's the only specific instance.

10 Q. Okay. Do you have any other
11 recollection?

12 A. Of?

13 Q. Of any other photograph that was
14 pulled from social media for display on
15 Newsweek?

16 A. Yes.

17 MS. WOLFF: Objection to form.

18 BY MR. BURROUGHS:

19 Q. What is that recollection?

20 A. I mean, we've done it before with
21 other stories when it relates to the story.

22 Q. Can you recall any story --

23 A. I can't recall a specific story. We
24 post hundreds of stories in a day, so it's
25 difficult for me to isolate just one.

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1 Q. Okay. So as you sit here today, can
2 you recall any story other than the McGucken
3 story in which Newsweek displayed a photograph
4 pulled from social media?

5 MS. WOLFF: Objection to form.

6 A. Like I said, it's difficult for me
7 to isolate a specific story.

8 Q. Can you recall any other story?

9 A. Not a specific story.

10 Q. Can you recall anything about any
11 other story?

12 A. Not a specific story.

13 Q. Can you recall anything specific
14 general or otherwise?

15 A. I cannot.

16 Q. Does Newsweek have in place the
17 policy regarding pulling photos from social
18 media?

19 A. Yes.

20 MS. WOLFF: Objection to form.

21 BY MR. BURROUGHS:

22 Q. Okay. When were you first made
23 aware of that policy?

24 A. I created the policy in 2018.

25 Q. Okay. In creating the policy, were

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1 you advised by counsel?

2 A. I did run it by -- I did send what I
3 wrote to appropriate people within our company
4 for their review.

5 Q. Were any of those, and I don't want
6 you to tell me what they said, but were any of
7 those attorneys?

8 A. I don't know specifically if they
9 were attorneys.

10 Q. Okay. So who did you send it to
11 within the company?

12 A. I sent it to my editors. I sent it
13 to our CFO. I sent it to Yuliya, I mentioned
14 earlier.

15 Q. Okay. Which editors did you send it
16 to?

17 A. That would be Nancy, our
18 editor-in-chief.

19 Q. And what's her last name?

20 A. Sorry, I'm a little nervous. I
21 apologize. I can --

22 Q. If you don't remember, that's fine.
23 Do you remember the name of any other editors
24 to whom you sent the work?

25 A. Yes, Dayan with a "Y". D-A-Y-A-N.

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1 Q. Okay. Do you recall her last time?

2 A. That's a he and it's a long last
3 name.

4 Q. What do you recall about the last
5 name?

6 A. I believe it begins with an "n."
7 I'm sorry. I'm not particularly good with last
8 names.

9 Q. That's okay. You also indicated you
10 sent it to the CFO. Who is the CFO that you
11 sent it to?

12 A. Sorry, our CCO, chief content
13 officer. That was Dayan.

14 Q. Is Dayan still the CCO?

15 A. Yes.

16 Q. What is your understanding of what
17 the CCO's role is at the company?

18 A. That he guides the editorial
19 direction.

20 Q. Okay. And would that include visual
21 assets like photography?

22 A. It would include everything.

23 Q. Okay. Do you recall if he had any
24 feedback regarding your social media
25 guidelines?

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1 A. I do not recall having any feedback.

2 Q. Do you recall any feedback from
3 anyone at Newsweek?

4 A. Not specifically.

5 Q. Do you recall anything generally?

6 A. Not generally.

7 Q. Do you recall any feedback that you
8 received from anyone in regard to the
9 guidelines?

10 A. I do not recall any feedback.

11 Q. Okay. From where did you draw in
12 drafting those social media guidelines for
13 Newsweek?

14 A. Industry standards that I knew from
15 my experience as being a photo editor and it
16 would be updated periodically as needed.

17 Q. Okay. So the Newsweek social media
18 guidelines were drawn based on your personal
19 professional experience, correct?

20 A. Correct.

21 Q. Were they based on anything else?

22 A. My experience and from what I know
23 about what kind of things to be aware of within
24 posting images.

25 Q. Okay. And that particular

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1 experience you're referencing, can you break
2 down for me what that is?

3 A. I started my career working for a
4 local newspaper in 2013. I worked with them
5 for four years. Then I moved on to another
6 magazine company, which I worked for for six
7 years. Then I worked for Washingtonian for
8 three years followed by the agency for a year
9 and been here with Newsweek for over three
10 years now. So it's a fairly long career and
11 seen a lot, heard a lot, so fairly familiar
12 with what are the dos and don'ts of how to use
13 visuals.

14 Q. Okay. And can you estimate for me
15 when you drafted those guidelines?

16 A. It would have probably been either
17 -- it would have been early 2018, I believe.
18 Maybe even late 2017.

19 Q. Okay. And what was the name of the
20 magazine that you worked at for six years?

21 A. It was Bonnier Corporation. I
22 worked within their travel group. The magazine
23 I worked for the longest for them was
24 Designation Weddings and Honeymoons and I also
25 worked with Caribbean Travel & Life, Spa

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1 Magazine, Parenting Magazine. I think I worked
2 on Yachting a little while too. It was a wide
3 range of publications within their suite.

4 Q. Okay. And what was your title
5 there?

6 A. I was photo editor.

7 Q. Okay. So is it fair to say that the
8 social media guidelines that you drew up for
9 Newsweek were based on your decade or so of
10 time in the industry?

11 A. Yes.

12 Q. And is it fair to say that they
13 reflect your understanding of industry
14 standards?

15 A. Yes.

16 Q. And is it fair to say that Newsweek
17 adopted those guidelines?

18 A. Yes.

19 Q. Were those guidelines circulated to
20 everyone at the company?

21 A. That I'm aware of, yes. It's also
22 been provided to our hiring manager whom I've
23 requested that she make sure everyone that
24 starts with the company receives a copy.

25 Q. Okay. Was there anything else

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1 submitted to new hires related to intellectual
2 property other than your guidelines?

3 A. I couldn't say for sure. I don't
4 know what's included in the package.

5 Q. Okay. Were you responsible for
6 updating the guidelines as time passed?

7 A. Yes, I did and every time I updated
8 it, I made sure it was recirculated.

9 Q. Would you add in new dates to the
10 guidelines or indicate in some way that they've
11 been updated?

12 A. Yes.

13 Q. Okay. How many versions of the
14 guidelines do you recall drafting?

15 A. Most probably maybe five.

16 Q. So five different versions of the
17 guidelines?

18 A. To the best of my knowledge.

19 Q. Okay. And other than yourself, who
20 would know what was transmitted to employees or
21 new hires by Newsweek along with your
22 guidelines, if anything?

23 A. I'm not sure I understand the
24 question.

25 Q. You indicated before that you didn't

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1 know whether or not anything else was sent with
2 your guidelines. Do you recall that?

3 A. Yes.

4 Q. Who would know that?

5 A. That would probably be Nancy. Nancy
6 Cooper, sorry, is the last name. Nancy Cooper
7 as well as Leiann Kaytmaz who's our HR person.

8 Q. Are you aware of any instance in
9 which those guidelines were violated by
10 Newsweek?

11 A. I can't recall any specific instance
12 that it was intentionally violated.

13 Q. Okay. As you sit here today, do you
14 recall any instance in which social media
15 guidelines that you wrote and Newsweek adopted
16 were violated by anyone working at or with
17 Newsweek?

18 MS. WOLFF: Asked and answered.

19 A. Not that I can recall beyond what
20 I've already stated.

21 Q. Okay. So in your entire tenure with
22 the company, you don't recall those guidelines
23 ever being violated, correct?

24 A. Not specifically.

25 Q. How about generally?

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1 A. Not generally.

2 Q. Okay. So is it fair to say then
3 that during your tenure at the company you
4 don't recall the social media guidelines that
5 you drafted and Newsweek adopted have ever been
6 violated?

7 A. Not that I could recall at this
8 moment.

9 Q. What do you recall in terms of your
10 revisions to the guidelines that had to do with
11 the use of third-party content?

12 A. I don't believe that was changed
13 much, the third-party content. We're already
14 pretty explicit.

15 Q. Okay. And what were you explicit in
16 stating?

17 A. That permission usually needs to be
18 requested if it's coming from a third party.

19 Q. You said that it usually needs to be
20 requested. In what circumstances does it not
21 need to be requested?

22 A. If it's an embedded image.

23 Q. And what to your understanding is an
24 embedded image?

25 A. If a link is applied to the site and

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1 it's not hosted on our site.

2 Q. Okay. And is that set forth in the
3 guidelines?

4 A. If we don't specify Instagram embeds
5 in the guidelines.

6 Q. Is there any reference to any embeds
7 in the guidelines?

8 A. No.

9 Q. Is there any reference to embedding
10 in any guidelines: the ones you drafted, or any
11 others that you've seen at Newsweek that refer
12 to embedding?

13 A. No.

14 Q. Now, you indicated that your
15 guidelines only required that Newsweek request
16 the right to use third-party content; is that
17 accurate?

18 A. We need permission for third-party
19 content.

20 Q. Okay. So it's not only that
21 Newsweek has to request the consent, it's that
22 they actually have to receive consent?

23 A. Correct.

24 Q. Under your policy, what is the
25 result when Newsweek requests permission but

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1 doesn't receive it from a third-party creator?

2 A. We typically would not use it.

3 Q. Can you think of any time that you
4 asked for consent, did not receive it, yet used
5 the content anyways?

6 A. I can't recall any situation.

7 Q. Other than your guidelines, have you
8 ever seen any other guidelines relating to the
9 use of social media content on Newsweek's site?

10 A. Not that I could recall.

11 Q. Do you recall ever having any
12 conversations other than with your counsel
13 about whether or how Newsweek can display
14 social media content without the consent of the
15 creator?

16 A. Not that --

17 MS. WOLFF: Object to form.

18 A. Not that I can recall.

19 Q. In your decade or so experience in
20 the industry, do you believe it violates
21 industry-standard to display someone's
22 photograph on your commercial website without
23 obtaining their consent?

24 MS. WOLFF: Object to form.

25 A. We're not a commercial entity.

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1 Q. Understood. But can you still
2 answer the question or you need me to rephrase
3 it?

4 A. Could you rephrase?

5 Q. Sure. Given your experience in the
6 industry, does it violate industry-standard to
7 post an artist's photograph or display an
8 artist's photograph without their consent on a
9 website?

10 MS. WOLFF: Object to form.

11 A. That depends on the context.

12 Q. Can you give a context in which it's
13 not okay?

14 A. You can't, for example, you couldn't
15 take a picture of a coffee cup from a website
16 and use it for a random story about coffee. It
17 has to be specific to that story; otherwise it
18 doesn't relate.

19 Q. Understood. So it's your
20 understanding based on your experience in the
21 industry, that so long as the story is about
22 the photograph, then Newsweek can display that
23 photograph without the creator of that
24 photograph's consent; is that accurate?

25 A. Correct.

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1 MS. WOLFF: Objection.

2 Mischaracterizes.

3 MR. BURROUGHS: Did you get her
4 response, Madam Court Reporter?

5 THE REPORTER: Yes.

6 BY MR. BURROUGHS:

7 Q. Do you take photographs yourself?

8 A. I have in the past.

9 Q. But you don't currently create
10 photographs?

11 A. For personal use I do.

12 Q. Okay. If you, for personal use,
13 took a photo of a photograph on a website,
14 posted it, and wrote an article about it, would
15 you have an objection to that?

16 A. It depends on the context.

17 Q. In what context would you not have
18 an objection?

19 A. If it had newsworthiness and it was
20 properly accredited to me or shared as a link,
21 I've had that happen in the past. I actually
22 had an image go viral, so I've experienced
23 that.

24 Q. Okay. Any other context?

25 A. It needs to have newsworthiness and

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1 be specific to that visual. But beyond that,
2 no.

3 Q. Okay. So other than your experience
4 in the industry, where did you gain that
5 knowledge that as long as the photograph is
6 newsworthy it can be exploited without consent?

7 MS. WOLFF: Objection.

8 A. My experience has to do with being a
9 photo editor and working in the industry.

10 Q. Is there any other basis for your
11 understanding that newsworthiness allows you to
12 use an artist's work without consent?

13 MS. WOLFF: Objection.

14 A. Just based on my experience as a
15 photo editor.

16 Q. Okay. Other than what you told me
17 before, relating to the different publications
18 that you worked for, what other experience
19 informs that understanding?

20 A. Just this -- only as being a photo
21 editor. I've been a photo editor for many
22 years.

23 Q. Okay. Do you recall when you first
24 heard the term "newsworthiness"?

25 A. I couldn't recall.

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1 Q. Okay. What does that word mean to
2 you?

3 A. If it's of interest or -- to society
4 as a whole.

5 Q. Okay. We are going to put a
6 document in front of you marked Exhibit 1. Ms.
7 Zaharia is going to put that on her screen, so
8 take a look. This is the deposition notice.

9 Okay. While Ms. Zaharia is pulling
10 that exhibit, let me go on and ask a couple of
11 other questions and withdraw the exhibit
12 introduction for the time being.

13 What is your understanding of the
14 manner in which a photo can be pulled from a
15 social media website, specifically Instagram?

16 MS. WOLFF: Object to form. You can
17 answer.

18 A. Are we talking about embedding a
19 link or are we talking about removing the image
20 entirely?

21 Q. I'm asking you how in your role as
22 the photo editor at Newsweek, do you pull
23 images from Instagram?

24 A. It typically, it would probably be
25 by a link.

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1 Q. So what's your process for doing
2 that?

3 A. There's a -- we go to Instagram and
4 we copy the embed link and it could be pasted
5 into the CMS. So it shows up as it would on
6 Instagram.

7 Q. Have you ever done that personally?

8 A. Personally, I have not.

9 Q. Who at Newsweek does that?

10 A. Typically, it would be the writer
11 who is posting the story.

12 Q. Okay. So other than engaging in the
13 embed process you just mentioned, how else can
14 Newsweek display a photograph on its site that
15 originated on Instagram?

16 A. We would need to go to the person
17 who took the image, request for the image to be
18 sent to us, and then we would post it -- we
19 would upload it to our site and host it that
20 way.

21 Q. Okay. So in that situation, you're
22 not actually taking the photograph from
23 Instagram, you're contacting the person that
24 posted it to Instagram, correct?

25 A. Correct. In that situation, yes.

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1 Q. Other than embedding an Instagram
2 image, are you aware of any other manner in
3 which a photograph can be copied from Instagram
4 for display on Newsweek's site?

5 A. I know of other ways it could be
6 done, but not that we would do it that way.

7 Q. What ways are those?

8 A. A screenshot could be taken.

9 Q. Okay. Any other ways?

10 A. Not that I could recall.

11 Q. Okay. So as far as you know, the
12 only way to pull photographs from Instagram for
13 display on Newsweek's site is to either embed
14 the content or publish a screenshot of the
15 content, correct?

16 A. Or to have the person send us the
17 image.

18 Q. Okay. And in that latter case, the
19 person sending you the actual photograph
20 directly, correct?

21 A. Correct.

22 Q. All right. Are you familiar or have
23 you seen the McGucken article that we're here
24 to discuss today?

25 A. Yes.

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1 Q. Okay. When do you first recall
2 seeing that?

3 A. I believe it was in October of 2019.

4 Q. Okay. Were you involved with that
5 article at or around the time it was published
6 by Newsweek?

7 A. I was not involved when it was
8 published.

9 Q. Okay. Do you know who was involved
10 in the creation of that article?

11 A. Other than the writer, I don't
12 recall any others.

13 Q. Okay. And who's the writer?

14 A. Katherine. Sorry, I don't recall
15 the last name.

16 Q. Does Hignett refresh your
17 recollection?

18 A. Yes, that sounds correct.

19 Q. Okay. Did you work with Ms. Hignett
20 while at Newsweek?

21 A. Yes, I had.

22 Q. Did you work with her in connection
23 with placing photography for her articles?

24 A. If it was in the print magazine, I
25 might have worked with her. Yes.

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1 Q. Did you ever work with her in
2 connection with the website?

3 A. Not in connection with the website
4 unless it was something that ran in the story
5 -- ran in the magazine and I was putting it in
6 the CMS for her to post that specific story
7 from the magazine.

8 Q. Do you recall that ever happening?

9 A. Not a specific instance of doing
10 that, but I do recall at least one story where
11 I did work with her and with the magazine.

12 Q. With the physical magazine?

13 A. Correct.

14 Q. Okay. And did Ms. Hignett get a
15 copy of your social media guidelines?

16 A. I would believe she did.

17 Q. And why do you believe that?

18 A. Because it was sent out via e-mail
19 to the whole company. So I assume it would
20 have included her.

21 Q. Have you seen that e-mail?

22 A. I would have at some point, yes.

23 Q. Have you reviewed your e-mails to
24 see if you could find a copy of it?

25 A. I believe we provided a copy of it.

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1 Q. Okay. Have you reviewed your
2 e-mails to see if there were any other e-mails
3 between you and Ms. Hignett?

4 A. In relation to this story, I did
5 look. I did not have any direct e-mails to her
6 in relation to the story.

7 Q. Was the only e-mail you were able to
8 find, in your Newsweek e-mail inbox, the e-mail
9 relating to the circulation of your social
10 media guidelines for which she was a recipient?

11 A. Yes.

12 Q. When you searched your e-mail, what
13 keywords did you use?

14 A. Probably Newsweek guidelines.
15 Photo. Maybe photos for Web. And then usually
16 something with an attachment; that would be the
17 easiest way to find it.

18 Q. Did you ever search your e-mail
19 using the search term Hignett?

20 A. In relation -- I'm sorry, I'm a
21 little confused as to what you're asking.

22 Q. Well, you were asked to produce
23 certain e-mails relating to this dispute,
24 correct?

25 A. Correct.

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1 Q. And when looking for those documents
2 and e-mails, did you ever search your e-mail
3 for the term Hignett?

4 A. As far as a recipient?

5 Q. In any way?

6 A. I did search my e-mail for her.

7 Q. And it's your testimony that you
8 were only able to locate one e-mail; is that
9 correct?

10 A. Well, I have past e-mail
11 correspondence with her, but not related to the
12 story.

13 Q. What do you recall relating to the
14 substance of those other e-mails?

15 A. They were about a story that she was
16 working on in relation to someone who was
17 murdering cats.

18 Q. Have you spoken with Ms. Hignett
19 regarding this dispute?

20 A. I have not.

21 Q. When was the last time you spoke to
22 Ms. Hignett?

23 A. Probably in 2019, I believe.

24 Q. Okay. Was Ms. Hignett let go by
25 Newsweek?

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1 A. I'm not involved with hiring or
2 removal of people. I wouldn't know directly.

3 Q. What do you know about her
4 separation from Newsweek?

5 A. It's my understanding she left on
6 her own will.

7 Q. Okay. Did her leaving have anything
8 to do with the McGucken dispute?

9 A. Not that I'm aware of.

10 Q. And currently, she has no
11 relationship with Newsweek, correct?

12 A. I'm not involved with firing
13 writers, so I wouldn't know directly, but -- I
14 wouldn't know.

15 Q. Okay. Are you aware of her having
16 any relationship with Newsweek currently?

17 A. Not that I'm aware of, but I
18 wouldn't be the person working with her so I
19 wouldn't know.

20 Q. Does Newsweek still hold Ms. Hignett
21 out to the public as being on staff at
22 Newsweek?

23 A. I'm not involved with those
24 practices, so I wouldn't know. But not to my
25 knowledge.

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1 Q. If it did, would it surprise you
2 given that your understanding is that she left
3 the company in 2019?

4 A. I suppose, but I'm not involved with
5 that, or I wouldn't know why they would or
6 wouldn't.

7 MS. WOLFF: This is outside the
8 scope of what was in the notice and so the
9 witness has not been prepared on these
10 questions.

11 BY MR. BURROUGHS:

12 Q. In your experience, is it industry
13 standard for a publication to hold out a
14 particular reporter to the public as employed
15 by the publication after they've separated from
16 the publication?

17 MS. WOLFF: Objection.

18 A. I'm not familiar with that practice.

19 Q. Does your website have terms and
20 conditions?

21 A. Could you elaborate on the question
22 in terms of what?

23 Q. Does Newsweek.com have terms and
24 conditions?

25 A. For what?

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1 Q. For the website.

2 A. For readers? For writers posting
3 content? I'm not really sure I understand the
4 question.

5 Q. Okay. So as you sit here today,
6 you're not aware of Newsweek.com having any
7 terms and conditions; is that accurate?

8 A. I'm not familiar with --

9 MS. WOLFF: Objection.

10 A. -- the terms and conditions of
11 Newsweek's website.

12 Q. Understood. And you yourself have
13 never reviewed the terms and conditions of
14 Newsweek's website, correct?

15 A. Correct.

16 Q. Okay. All right. We're going to
17 put a document in front of you marked as
18 Exhibit 1, a deposition notice.

19 (Exhibit 1 marked for
20 identification.)

21 BY MR. BURROUGHS:

22 Q. And take a moment, Ms. Zaharia will
23 scroll slowly throughout it. If you want her
24 to go faster or slower, please let her know.
25 But just take a moment and tell me if you've

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1 seen this document before?

2 A. I believe I've seen this.

3 Q. And you understand that it indicates
4 that you are testifying on behalf of Newsweek
5 on particular topics?

6 A. Yes.

7 Q. Okay. Now, to prepare for
8 testimony, to give testimony on those topics,
9 who did you speak to other than your lawyer?

10 A. Yuliya. That's my main point of
11 contact regarding this.

12 Q. Okay. And when did you first speak
13 with Yuliya?

14 A. The first time she brought it to my
15 attention was October of 2019.

16 Q. Okay. And what did she tell you
17 when she brought it to your attention?

18 A. She just let us know that it existed
19 and asked me to look into it.

20 Q. Was that done by e-mail or phone
21 conversation or an in-person conversation or a
22 combination?

23 A. It would have been e-mail.

24 Q. Okay. Do you recall having any
25 in-person conversations or telephone

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1 conversations with Yuliya in or around October
2 2019 regarding this dispute?

3 A. I do not recall having a phone
4 conversation with her regarding this case.

5 Q. Okay. And in October of 2019, did
6 Yuliya request that you remove the disputed
7 McGucken article?

8 A. She did not request me to remove it.

9 Q. What did she tell you or communicate
10 to you?

11 A. She just simply asked me to look
12 into -- look into how the image or the visual
13 in question was to be displayed on the site as
14 part of the story.

15 Q. And did you do that?

16 A. Yes, I put her -- yeah, I put her in
17 touch with the appropriate people to get in
18 touch with the writer of the story.

19 Q. And who did you put her in touch
20 with?

21 A. I believe it was one of the people
22 from our HR department, Nancy, to see if they
23 can -- they had an e-mail on record for the
24 writer.

25 Q. Did you yourself reach out to

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1 Ms. Hignett?

2 A. I did not.

3 Q. In November of 2019, did Newsweek
4 remove the disputed McGucken post?

5 A. No.

6 Q. In December of 2019, did Newsweek
7 remove the disputed McGucken article?

8 A. No.

9 Q. In January of 2020, did Newsweek
10 remove the disputed McGucken article?

11 A. Yes.

12 Q. Okay. And why did it do so in
13 January?

14 A. I was requested to do so. I don't
15 know the reasoning.

16 Q. Did Yuliya request that you do so?

17 A. Yes.

18 Q. Was it your understanding that the
19 result of Yuliya's communication with Ms.
20 Hignett and potentially others resulted in the
21 discovery that this use was without consent?

22 MS. WOLFF: Objection.

23 A. I don't recall. I couldn't
24 speculate what her reasoning was.

25 Q. Okay. So no one at Newsweek ever

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1 told you why they wanted the McGucken article
2 removed; is that accurate?

3 A. It was not -- the information was
4 not relayed to me as to why.

5 Q. Okay. Are you aware of what that
6 information is?

7 A. No.

8 Q. Okay. So as you sit here today, you
9 have no understanding as to why you were asked
10 to remove the McGucken article from
11 Newsweek.com, correct?

12 A. Correct.

13 Q. Currently, is Newsweek embedding
14 content from Instagram without the creator's
15 consent?

16 A. It does happen, yes.

17 Q. When was the last time that
18 happened?

19 A. I couldn't say. I don't know.

20 Q. As you sit here today, can you
21 recall any instance in which Newsweek has
22 embedded Instagram content without the
23 creator's consent?

24 A. I cannot recall.

25 Q. Other than the McGucken article, can

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1 you recall any instance in which Newsweek
2 embedded Instagram content without the
3 creator's consent?

4 A. No.

5 Q. Okay. So is it fair to say that
6 Newsweek did not have a pattern of practice of
7 embedding Instagram content without the
8 artist's consent?

9 MS. WOLFF: Objection.

10 A. It's not against our policy, but I
11 don't know how often it happens.

12 Q. In fact, you don't recall it ever
13 happening other than the article for which the
14 lawsuit is taking place, correct?

15 A. I do not. I'm not involved with the
16 embedding of images in stories, so I couldn't
17 state when or how often it happens. It's not
18 something I'm involved in.

19 Q. Okay. And before today, you didn't
20 look to see whether or not there were other
21 articles in which a creator's content had been
22 stolen from Instagram or embedded from
23 Instagram on Newsweek's page?

24 A. We don't steal.

25 Q. Do you understand the question?

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1 MS. WOLFF: Objection to form.

2 BY MR. BURROUGHS:

3 Q. Okay.

4 A. If you could rephrase it.

5 Q. Sure. Before today, have you
6 reviewed Newsweek's site to see if there were
7 any other instances in which a creator's
8 content was taken and used from Instagram
9 without the creator's consent on Newsweek.com?

10 MS. WOLFF: Objection.

11 A. I cannot -- I do read Newsweek
12 articles, but I don't -- I can't recall any
13 situations where I've frequently seen that or
14 can recall the last time I had seen an
15 Instagram image embedded in a story.

16 Q. Okay. As part of your job at
17 Newsweek, do you review the articles posted to
18 Newsweek.com?

19 A. Only the ones that are involved with
20 the magazine.

21 Q. Are you referring to the physical
22 magazine?

23 A. Correct.

24 Q. So you have no involvement with the
25 articles that are posted to Newsweek.com; is

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1 that accurate?

2 A. Occasionally, I'm asked to help out
3 on a Web story, but for the most part, I do not
4 on a day-to-day am involved in it.

5 Q. Okay. Does anyone have your role as
6 it relates to the Newsweek.com site?

7 A. No.

8 Q. Okay. So there is no director of
9 photography for Newsweek.com, correct?

10 MS. WOLFF: Objection to form.

11 A. No.

12 Q. Is there a director of photography
13 for Newsweek.com?

14 A. I am director of photography for the
15 company, but my focus is the magazine.

16 Q. Okay. Does anyone fill the role
17 that you fill for the magazine for the website?

18 MS. WOLFF: Objection.

19 A. There is no other photo editor, if
20 that's what you're asking.

21 Q. Okay. So is it fair to say that
22 you're Newsweek's director of photography, but
23 your primary focus is the print magazine?

24 A. Correct.

25 Q. And don't regularly review the

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1 articles posted on Newsweek.com, correct?

2 A. Correct. There's hundreds of
3 stories posted a day. It's not feasible.

4 Q. Okay. And you've never seen any
5 article on Newsweek.com other than the McGucken
6 article that used content taken from Instagram
7 without the creator's consent, correct?

8 MS. WOLFF: Object to form.

9 A. Correct.

10 Q. Have you had any writers or other
11 Newsweek team members contact you in the last
12 year and ask you if they can embed an Instagram
13 photograph on Newsweek without the artist's
14 consent?

15 A. No one's asked me.

16 Q. Okay. Does Newsweek.com run
17 advertising?

18 A. Yes.

19 Q. Do you have any involvement with the
20 sale or placement of the advertising?

21 A. No.

22 Q. Do you know if it's programmatic or
23 some other form?

24 A. I'm not involved with the
25 advertisements. I couldn't say.

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1 Q. Okay. So after Yuliya sometime in
2 January of 2020 asked you to remove the
3 McGucken photograph, did you have any further
4 conversations with Yuliya about this dispute?

5 A. She asked me if I had any guide --
6 she asked me for my guidelines and for dates
7 related to the guidelines and any other
8 educational material.

9 Q. Okay. And did you respond?

10 A. Yes.

11 Q. And did you send her the material?

12 A. Yes.

13 Q. Did that include the Getty material?

14 A. Yes.

15 Q. Okay. After you sent that to her,
16 did you have any further conversations or
17 communications relating to this dispute?

18 A. Not specifically that I could
19 recall.

20 Q. Okay. Did you discuss this
21 deposition with her or communicate with her
22 regarding this deposition?

23 A. Only in relation to timing.

24 Q. So Yuliya advised you what time the
25 deposition was; is that correct?

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1 A. She asked about availability.

2 Q. Was there anything else communicated
3 between the two of you regarding this
4 deposition or the substance of the case?

5 A. There was some correspondence, yes.

6 Q. Okay. What was covered in that
7 correspondence?

8 A. I just gave her feedback as to
9 questions that I felt comfortable answering and
10 ones that I felt less familiar with.

11 Q. Okay. Did you ever indicate to her
12 whether or not you thought the McGucken article
13 was a violation of your social media
14 guidelines?

15 A. By industry standards, it is not
16 considered a violation. So no.

17 Q. So you never advised her one way or
18 the other?

19 A. I did not.

20 Q. Okay. So is it fair to say that you
21 never advised Yuliya or anyone at Newsweek that
22 the use of the McGucken content from Instagram
23 was not a violation of your guidelines?

24 A. Can you rephrase? I'm sorry.

25 Q. Sure. Well, I can ask it this way:

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1 Did you ever advise Newsweek that the use of
2 the McGucken content from Instagram did not
3 violate your social media guidelines?

4 A. Based on our knowledge of what is
5 allowed and what is not, it did not violate.

6 Q. Did you ever advise anyone at
7 Newsweek of that fact or that belief?

8 A. Yeah.

9 Q. Who did you advise of that?

10 A. Yuliya.

11 Q. And Yuliya agreed with you?

12 A. Yeah.

13 Q. And is that why Yuliya continued to
14 run the post from October until January
15 of 2020?

16 MS. WOLFF: Objection.

17 A. I can't speculate as to her
18 reasoning.

19 Q. Okay. To your understanding, why
20 did Newsweek continue to run the McGucken
21 article from October 2019 to January 2020?

22 MS. WOLFF: Objection.

23 A. My understanding is it didn't
24 violate any policies.

25 Q. And this is something that you

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1 communicated with Yuliya, correct?

2 A. I mean, it was up to her to make the
3 call whether or not to remove it, but by our
4 understanding, it was not, you know, it wasn't
5 against any policy.

6 Q. Okay. So is it your understanding
7 that Yuliya's decision not to remove the
8 McGucken content in October of 2019, November
9 of 2019, or December of 2019 was based on the
10 communication with you and your belief that the
11 use of the McGucken content from Instagram
12 without his consent did not violate your social
13 media guidelines?

14 MS. WOLFF: Objection.

15 A. I don't get final say in the matter,
16 so it's up to them to decide. I just provide
17 them with what I'm aware of.

18 Q. Understood. So it sounds like you
19 advised Yuliya that the post at issue or the
20 article at issue did not violate the social
21 media guidelines and Newsweek continued to
22 publish the image with notice of the dispute,
23 but you don't know if it's because of your
24 interaction with Yuliya or some other reason.
25 Is that fair to say?

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1 A. Yes.

2 Q. In your experience, has Newsweek
3 ever removed content in response to a claim by
4 an artist that the content was being used
5 without consent?

6 A. I believe that's happened in the
7 past.

8 Q. When was the last time you remember
9 that occurring?

10 A. Maybe about a year ago.

11 Q. Do you recall the circumstances?

12 A. Not off the top of my head.

13 Q. Okay. But do I have the essence
14 right that a content creator contacted Newsweek
15 and advised that the material posted on
16 Newsweek violated its intellectual property
17 rights in some way?

18 A. It has happened.

19 Q. Okay. What is Newsweek's business
20 practice for responding to such notices?

21 A. I don't know what our legal under --
22 I'm not involved with that, so I couldn't speak
23 to it.

24 Q. Okay.

25 A. I don't know.

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1 Q. Does Newsweek have a formal policy,
2 which you're aware, for responding to copyright
3 notices?

4 A. We have a process, yes.

5 Q. And what's that process?

6 A. Like I said, I'm sorry, I don't know
7 what the process is, I just know we have one
8 and I'm asked to advise occasionally when it
9 does.

10 Q. How do you know that such a process
11 exists?

12 A. Because we have an e-mail addressed
13 specific for copyright claims, so I know that
14 we have the availability to receive those
15 requests.

16 Q. Is that copyright@newsweek.com?

17 A. I believe it is.

18 Q. Okay. To your understanding, has
19 that e-mail address been fully functional
20 during your tenure at Newsweek?

21 MS. WOLFF: Object to form.

22 A. I'm not involved with the e-mail
23 system, so I couldn't say if it's ever not
24 worked, but as far as I know it works.

25 Q. So it's fair to say that you're

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1 aware that a copyright e-mail address exists
2 but you have no personal experience as to
3 whether or not it's functional. Is that fair
4 to say?

5 A. Yeah, the e-mails do not go to me,
6 so I don't know.

7 Q. Okay. So is the process by which
8 Newsweek responds to these notices an informal
9 one?

10 MS. WOLFF: Objection.

11 A. I don't know what would constitute
12 formal, so I couldn't say.

13 Q. Well, is the policy a written
14 policy?

15 A. I'm not involved with the procedure,
16 so I couldn't say.

17 Q. Are you aware of any written policy
18 that speaks to Newsweek's process for
19 responding to copyright notices?

20 A. Beyond what's on the website, I do
21 not know.

22 Q. Okay. Have you ever been instructed
23 about a formal process that Newsweek uses to
24 respond to copyright notices?

25 A. Not beyond what I've already stated.

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1 Q. Okay. So as far as you know when
2 Newsweek receives a copyright notice, an e-mail
3 goes out and you look into it. Is that fair to
4 say?

5 A. I know someone receives the e-mails
6 and they're relayed to the appropriate people.

7 Q. Okay. Is there anything more formal
8 than that?

9 MS. WOLFF: Object to form.

10 A. I'm not familiar with the process,
11 so I couldn't say for sure.

12 Q. Can you say anything about a more
13 formal process?

14 MS. WOLFF: Objection.

15 A. I'm not familiar with the process
16 specifically, the specifics of the process so I
17 couldn't say.

18 Q. Okay. Can you estimate for me how
19 many times you've been involved in the process?

20 A. I don't know the exact number, but I
21 would say in the past year it's probably maybe
22 five times I've been asked to look into
23 something.

24 Q. Okay. And of those approximately
25 five times, did you remove the content in each

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1 situation?

2 MS. WOLFF: Objection.

3 A. Most of the cases I believe they
4 were not removed because they didn't end up
5 being an issue.

6 Q. Okay. Did any of those instances
7 relate to embedded content from Instagram or
8 any third-party social media site?

9 A. We had one, I think, instance
10 someone asked us to take something down, but it
11 was nothing to do with the copyright and it was
12 just a preference.

13 Q. And what was the preference?

14 A. Someone just asked they -- we didn't
15 have a video that had them in it.

16 Q. Was that removed?

17 A. They disabled it on their end. So
18 we removed it, but it was disabled on their end
19 so there was no, there was no action needed.

20 Q. Okay. To your understanding, the
21 McGucken content at issue here has been removed
22 though at this point, correct?

23 A. At this point I believe it's been
24 removed, yes.

25 Q. Is the article still online?

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1 A. The article is still online.

2 Q. And was the photo asset replaced?

3 A. The photo asset was not replaced.

4 Q. Okay. So do you know what's in the
5 place of the photo asset now?

6 A. It was removed.

7 Q. When I say the "photo asset," I'm
8 referring to the McGucken embedded photograph.

9 A. It's the same story just minus the
10 Instagram embed.

11 Q. Okay. Would it surprise you to
12 learn that the photography asset was replaced
13 with a different photograph?

14 A. It would. Last time I looked at the
15 site it was not replaced.

16 Q. Okay. When was the last time you
17 looked at the site?

18 A. This morning.

19 Q. Okay. To the extent that the site
20 now has a new photograph, that would have
21 happened sometime after this morning; is that
22 correct?

23 MS. WOLFF: Object to form.

24 A. Yes, it would.

25 Q. Okay. Do you know who would have

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1 been responsible for placing that photograph?

2 A. There's multiple people that have
3 access to the CMS, so it's, you know, I
4 wouldn't know there's one person specifically.

5 Q. Okay. Other than yourself who has
6 access?

7 A. Pretty much every writer or editor.

8 Q. Okay. Can you give me the names of
9 those that you can recall?

10 A. There's many. There's many.

11 Q. Okay. Other than Yuliya, did you
12 speak with anyone else about this case or in
13 preparation for today's deposition?

14 A. Nancy Cooper has been involved in
15 some of the e-mails.

16 Q. Okay. Have you had any telephone
17 conversations with Nancy or Yuliya about this
18 deposition or this dispute?

19 A. No phone conversations.

20 Q. Okay. And when did you first
21 communicate with Nancy about this dispute?

22 A. She probably would have been on the
23 first e-mail.

24 Q. Okay. And did she have any response
25 or did she give you any indication about

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1 whether or not she believed that the use of the
2 McGucken content violated Newsweek's policies?

3 A. Not that I recall.

4 Q. Okay. When was the last time you
5 communicated with her?

6 A. Regarding this case?

7 Q. Correct.

8 A. Maybe about a week ago, two weeks.
9 I'm not sure.

10 Q. Okay. And what was discussed during
11 that conversation?

12 A. Just specifics of timing, my
13 availability, and including one additional
14 person to be involved in answering your
15 questions.

16 Q. Okay. And who is that additional
17 person?

18 A. That'll be James who you'll speak
19 with tomorrow.

20 Q. Okay. Can you give me James's last
21 name?

22 A. Etherington-Smith. James
23 Etherington-Smith. It's hyphenated. Dash
24 Smith.

25 Q. Have you ever had any communication

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1 with Etherington-Smith?

2 A. Yes.

3 Q. Were those by e-mail or telephone or
4 some other way?

5 A. It was by e-mail and by phone.

6 Q. Okay. When did you last speak with
7 James?

8 A. I believe it was Monday or
9 yesterday. The days are blurring.

10 Q. Did he call you or did you call him?

11 A. It was a group call.

12 Q. Okay. Were attorneys on the call?

13 A. Yes.

14 Q. Okay. Other than that call, have
15 you had any other conversations with James?

16 A. There was one previous phone call we
17 had together.

18 Q. Okay. And what was the substance of
19 that call?

20 A. It was just preparations for this
21 case.

22 Q. Okay. What did you discuss in
23 preparation?

24 MS. WOLFF: Objection. I believe
25 attorneys were on that call.

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1 A. Correct.

2 Q. Were attorneys on that call as well?

3 A. Correct.

4 Q. Have you ever had a conversation
5 with James regarding this case other than with
6 attorneys on the line?

7 A. No.

8 Q. Okay. Does James work out of
9 Newsweek's U.S. office or a different one?

10 A. He's in our London office.

11 Q. Okay. Do you work with James on a
12 day-to-day basis in your role as the -- in your
13 role at Newsweek?

14 A. Not day-to-day, but we have
15 corresponded in the past.

16 Q. Okay. Other than in connection with
17 this case, when was the last time you recall
18 corresponding with him?

19 A. I can't recall.

20 Q. Okay. Okay. Other than Yuliya,
21 Nancy, and James, did you speak with anyone
22 else about this case or about today's
23 proceedings?

24 A. No, not that I can recall.

25 Q. Did you communicate with anyone else

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1 by e-mail, text message, anything like that?

2 A. All our correspondence for this case
3 were over e-mail or the calls that I've had
4 with our attorneys.

5 Q. Okay. In your day-to-day at
6 Newsweek, is the vast majority of your
7 communication done by e-mail?

8 A. Most of it is over e-mail or over
9 our Slack channel.

10 Q. Okay. Slack, S-L-A-C-K.

11 Is there a dedicated Slack channel as
12 Newsweek for photography or photo assets?

13 A. Not specific to photography.

14 Q. The channel in which photography is
15 discussed on your Slack program, what's it
16 titled?

17 A. General.

18 Q. Are photos uploaded to that general
19 channel?

20 A. I suppose they have been in the
21 past. It's mostly used just for conversation.

22 Q. Conversation about the photographs?

23 A. Or stories. It's mostly pictures or
24 some ideas; just anything that might be needed
25 to go to, you know, go to the newsroom.

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1 Q. Okay. So would a photographer at
2 Newsweek upload a photograph and say, "I'd like
3 to do an article about this photograph," has
4 that happened?

5 A. I'm not directly involved with the
6 creation of stories, but I presume.

7 Q. Have you seen that?

8 A. Yes, I believe I've seen that.

9 Q. Have you ever accessed the storage
10 for your -- for the Newsweek Slack program and
11 looked at the photo assets that have been
12 uploaded?

13 A. No.

14 Q. Has this case ever been discussed on
15 the Newsweek Slack channel?

16 A. Not that I'm aware.

17 Q. Any of them?

18 A. Not that I'm aware.

19 Q. Was Newsweek using Teams in 2019?
20 I'm sorry, withdraw the question.

21 Was Newsweek using Slack in 2019?

22 A. Yes.

23 Q. In or around February of 2019?

24 A. Yes.

25 Q. Okay. Have you had occasion to

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1 search your Slack platform using the search
2 term "Instagram"?

3 A. I have not, but I don't believe we
4 -- our Slack stores information for very long.

5 Q. What's that based -- what's your
6 basis for that belief?

7 A. Typically, when I've gone back to
8 look at old conversations, they've disappeared.

9 Q. Okay. Do you know if Newsweek uses
10 the free version of Slack or the paid version?

11 A. I don't know which version they're
12 using.

13 Q. Are you aware of anyone at Newsweek
14 searching the Slack files to look for messages
15 relevant to this dispute?

16 A. I'm not aware of that.

17 Q. Okay. But you are aware of writers
18 pitching stories on Newsweek's Slack program,
19 right?

20 A. Yes.

21 Q. Okay. And the Newsweek Slack is
22 used by everyone in the U.S. office, the London
23 office, and elsewhere, correct?

24 A. As far as I'm aware.

25 Q. All right. We're going to put in

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1 front of you an exhibit -- well, before we do
2 that. Other than the e-mails that we've
3 already discussed, did you review any other
4 documents in preparation for today's
5 deposition?

6 A. Not specific to this case, no.

7 Q. What did you review generally?

8 A. I generally reviewed the
9 correspondence that I had in relation to this
10 story.

11 Q. Okay. So aside from the
12 correspondence, did you review anything else,
13 any other documents or evidence to prepare
14 yourself for today?

15 A. I read the terms of service for
16 LinkedIn -- oh, I'm sorry, Instagram.

17 Q. Was that the first time you had read
18 those?

19 A. I've reviewed them in the past.

20 Q. When do you recall was the first
21 time that you had reviewed those?

22 A. I couldn't recall exactly.

23 Q. Would it have been within the last
24 six months?

25 A. Most likely, yes.

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1 Q. Okay. Do you recall ever reviewing
2 the Instagram terms of service before the last
3 six months?

4 A. I may have, I couldn't say for
5 certain.

6 Q. Do you recall that happening?

7 A. I likely did. I couldn't recall
8 when.

9 Q. Okay. When is the first time that
10 you recall reviewing those Instagram terms of
11 service?

12 A. Probably fairly early on when I
13 signed up with Instagram.

14 Q. And when would that have been?
15 What's your best estimate?

16 A. Oh, boy. 2013, maybe. I don't
17 recall the exact date. I'd have to look that
18 up.

19 Q. Understood. And at that time, were
20 you reviewing them in connection with your
21 personal Instagram account?

22 A. Yes.

23 Q. Okay. At the time, did you read the
24 embedding section of the terms?

25 A. Yeah, I would have.

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1 Q. Okay. Do you recall reading the
2 embedding terms in 2013?

3 A. I likely would have.

4 Q. Would you recall doing that?

5 A. It's a long time ago. I can't
6 recall specifically.

7 Q. So as you sit here today, you don't
8 recall reading the embedding language in the
9 Instagram terms of service in 2013, correct?

10 A. I don't recall doing it, but I
11 believe I would have.

12 Q. Okay. When do you recall actually
13 reading those embedding terms in Instagram's
14 terms?

15 A. I recall reading them when
16 photographers were signing off of the platform
17 because they were concerned that Instagram now
18 owned all their images.

19 Q. Okay. So that would have been in
20 the middle of -- middle to late 2019?

21 A. I don't recall exactly when it was.

22 Q. Okay. Would it have been any
23 earlier than June of 2019?

24 A. It probably would have been earlier
25 than that.

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1 Q. Okay. And is that because you
2 believed the story about photographers' work
3 being stolen from Instagram came out earlier
4 than that?

5 A. I believe so, yes.

6 Q. But is it fair to say that your
7 recollection is that you first reviewed the
8 Instagram embedding terms at or around the time
9 the stories came out about photographers
10 removing their work from Instagram?

11 A. Yes, I would have read it at that
12 time.

13 Q. Okay. Let's take a look at
14 Exhibit 2, which I believe it's Bates stamped
15 Newsweek 1 and 2.

16 (Exhibit 2 marked for
17 identification.)

18 BY MR. BURROUGHS:

19 Q. Okay. Have you -- well, do you want
20 us to scroll through to the next page so you
21 can take a look at this entire document?

22 A. I've seen the document.

23 Q. Okay. So you recognize this
24 document?

25 A. Yes.

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1 Q. What is it?

2 A. This is the guidelines, the photo
3 guidelines for Web use that we provide to our
4 writers.

5 Q. Okay. Is this the document that you
6 yourself drafted?

7 A. Correct.

8 Q. Okay. And this was drafted based
9 solely on your personal experience, correct?

10 A. Correct.

11 Q. Okay. And you don't recall anyone
12 at Newsweek other than yourself having input
13 into this particular document, correct?

14 A. Not that I recall, but it was based
15 off of my experience and things that I know
16 that are problematic.

17 Q. Okay. When was the last time you
18 looked at this document?

19 A. This morning.

20 Q. Okay. Now, I want you to direct
21 your attention to paragraph 3 where it says,
22 "Do not use images without requesting
23 permission."

24 Do you see that?

25 A. Yes.

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1 Q. Okay. Did you write that?

2 A. Yes.

3 Q. Would you say that that lead as a
4 general tenet is industry-standard, that a
5 publication should not, quote, use images
6 without requesting permission?

7 A. When it comes to hosting images
8 within your site, yes.

9 Q. Okay. So is it your position that
10 if you're not hosting the image you can use any
11 other artist's content for any purpose?

12 A. As long as you're not taking it out
13 of context.

14 Q. And what does that mean?

15 A. It means it remains within the
16 format it was originally created. For example,
17 if someone wanted to use a Newsweek cover, they
18 can use a Newsweek cover and description of
19 that context.

20 Q. So is it your understanding that
21 right now you can go to Instagram and embed any
22 photograph from any of the public's accounts
23 there on Newsweek and it wouldn't be a
24 violation of these terms?

25 A. If it was newsworthy and if it was

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1 within context of the story.

2 Q. So is the answer yes?

3 A. If it was newsworthy and in context.
4 You can't do it if it's not newsworthy or not
5 in context.

6 Q. Okay. So is it fair to say that
7 Newsweek's position relating to the use of
8 social media content, is that so long as the
9 use on Newsweek.com is newsworthy and within
10 context, Newsweek has the right to pull any
11 photograph from any artist on Instagram without
12 that artist's consent?

13 MS. WOLFF: Objection.
14 Mischaracterizes.

15 A. As an embed, yes.

16 Q. Okay. Now, do you see the word
17 "embed" anywhere in your social media
18 guidelines?

19 A. No.

20 Q. Okay. Is there any written document
21 anywhere within Newsweek's records that
22 reflects this embedding use that you're
23 describing now?

24 A. Not that I can recall.

25 Q. Okay. And you can't recall any

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1 other times in which Newsweek has used that
2 embed process on Newsweek.com, correct?

3 A. You mean have they embedded other
4 photographs in other stories?

5 Q. Correct.

6 A. Yes, they have.

7 Q. And when was the last time you can
8 recall that happening?

9 A. Not in relation to Instagram I can't
10 think of any.

11 Q. Okay. So as you sit here today, you
12 don't recall a single time that Newsweek has
13 ever embedded an Instagram photograph without
14 the author's consent, correct?

15 A. Not that --

16 MS. WOLFF: Objection.

17 BY MR. BURROUGHS:

18 Q. Go ahead.

19 A. Not that I can recall.

20 Q. Okay. You note here that "The
21 legalities around social media images are
22 continually evolving."

23 Do you see that?

24 A. Yes.

25 Q. And "What may be okay today, could

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1 put us in violation of copyright tomorrow."

2 Do you see that?

3 A. Yes.

4 Q. Okay. And you're familiar with
5 what's been happening in this case, correct?

6 A. Yes.

7 Q. Okay. So given that a Court has
8 ruled at least preliminary that embedding
9 photographs or taking work from artists on
10 social media without their consent even if
11 embedded --

12 MS. WOLFF: Objection.

13 BY MR. BURROUGHS:

14 Q. -- may be a violation of copyright
15 --

16 MS. WOLFF: There's no ruling.
17 Objection. I'm stopping you right there.
18 There's no ruling.

19 BY MR. BURROUGHS:

20 Q. Have you thought to update these
21 social media guidelines?

22 MS. WOLFF: Objection. Do not
23 answer that question. There's been no ruling
24 that says anything like that.

25 BY MR. BURROUGHS:

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1 Q. Okay. Let me rephrase. Given the
2 rulings that have come out of the court so far,
3 have you thought to update your social media
4 guidelines to reflect a different approach to
5 taking content from Instagram creators without
6 their consent?

7 MS. WOLFF: Objection. She's not an
8 attorney. She's not opining on rulings. Do
9 not answer.

10 BY MR. BURROUGHS:

11 Q. Okay. Have you thought to amend the
12 social media guidelines to reflect the position
13 on embedding?

14 A. We may eventually, but we have not
15 decided to do that at this moment.

16 Q. Okay. What conversations have you
17 had in that regard?

18 A. We've questioned whether or not the
19 policy is changed, but from our understanding,
20 Instagram still allows us. It's an
21 industry-standard still; it hasn't changed.

22 Q. Okay. So as of today, it's
23 Newsweek's intent to continue to embed
24 photographs from Instagram without the consent
25 of the creator; is that accurate?

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1 MS. WOLFF: Objection.

2 A. No decision has been made.

3 Q. Okay. So as of today, it would
4 still be within your social media guidelines
5 for a Newsweek.com writer to take content from
6 an artist on Instagram and post it without
7 their consent on Newsweek.com, correct?

8 MS. WOLFF: Objection.

9 A. Our policies haven't changed at this
10 moment.

11 Q. Okay. So if today a Newsweek writer
12 takes a photograph from Instagram.com without
13 the artist's consent and embeds it in a
14 Newsweek.com post, that would still be within
15 the social media guideline use at Newsweek,
16 correct?

17 MS. WOLFF: Objection.

18 A. If it's newsworthy and it's within
19 context.

20 Q. So the answer is yes?

21 A. In specific --

22 MS. WOLFF: Objection.

23 A. In specific circumstances.

24 Q. And the answer would be yes?

25 MS. WOLFF: Objection. Asked and

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1 answered.

2 BY MR. BURROUGHS:

3 Q. Sorry, I couldn't hear because of
4 the objection. Is the answer yes?

5 MS. WOLFF: Asked and answered. You
6 asked that three times in a row now.

7 MR. BURROUGHS: I don't think I
8 heard the answer because you were speaking over
9 the witness.

10 MS. WOLFF: No, she did answer. You
11 could repeat -- maybe the reporter can repeat
12 what she answered.

13 MR. BURROUGHS: I don't think so.

14 MS. WOLFF: I think she can. Let's
15 try. Why don't you read back the question for
16 us and the answer that she gave --

17 MR. BURROUGHS: We're not going to
18 read back the question.

19 MS. WOLFF: Okay. Move on.

20 MR. BURROUGHS: So I'll rephrase.
21 I'll rephrase it.

22 BY MR. BURROUGHS:

23 Q. So today if a Newsweek.com writer
24 takes a photograph from Instagram via an embed
25 without that artist's consent and publishes it

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1 to Newsweek.com, that would still be within and
2 compliant with Newsweek's guidelines for social
3 media use, correct?

4 MS. WOLFF: Objection.

5 A. I believe I did answer the question.

6 Q. Was the answer yes?

7 A. Within certain context.

8 Q. So within certain context the answer
9 would be yes, correct?

10 A. Within the context that it's in
11 relation -- a newsworthy story and it's within
12 -- referencing that specific image.

13 Q. In such a context, the answer would
14 be yes?

15 A. In that context, yes.

16 Q. Okay. And what is that context?

17 A. If it's newsworthy and if it's
18 referencing that specific image.

19 Q. Can you think of any situation in
20 when that context wouldn't apply?

21 MS. WOLFF: Objection. Speculation.

22 A. I mean, there's always situations
23 where it wouldn't apply.

24 Q. All right. So looking at the second
25 bullet point in paragraph 3. Do you see that?

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1 A. Yes.

2 Q. Does it say, "We -- meaning
3 Newsweek -- "must request permission for every
4 image we publish"?

5 Do you see that?

6 A. Yes.

7 Q. Now, what is your definition of
8 publish?

9 A. That would be hosted within our CMS.

10 Q. Okay.

11 A. The physical image hosted in our
12 CMS.

13 Q. So in your understanding, publish
14 does not mean display; is that accurate?

15 A. Correct.

16 Q. Do you recall if you've ever
17 indicated to the contrary that to display
18 something is to publish something?

19 MS. WOLFF: Objection. Legal.

20 A. Can you rephrase that?

21 Q. Sure. Do you ever recall indicating
22 on social media or elsewhere that to display
23 something is to publish something?

24 MS. WOLFF: Objection to form.

25 A. I mean, if we're talking

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1 specifically about what I wrote here, it's in
2 reference to hosting an image in our CMS.

3 Q. Does it say that anywhere?

4 A. The whole document is about the CMS.

5 Q. Where does it say that that is
6 limited to hosting or that publishing is on
7 hosting?

8 A. I mean, the whole point of this
9 piece -- I mean, I believe for Web use --
10 Photos for Web Use is the name of the document
11 and we do not specifically talk about links or
12 embeds.

13 Q. So is it fair to say that nowhere in
14 this document do you actually refer to hosting
15 as displayed or as publishing?

16 A. That specific word?

17 Q. Correct.

18 A. I don't believe I used that specific
19 word.

20 Q. Okay. So have you ever indicated in
21 the past that to display something on a website
22 is publishing it?

23 MS. WOLFF: Objection. We're
24 getting into legal definitions under copyright.
25 She's not an attorney.

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1 BY MR. BURROUGHS:

2 Q. I'm just asking as your personal
3 experience, do you recall ever seeing or
4 writing something like that?

5 A. There's more than one word that
6 could be used to describe the same thing, but
7 in this case, this was written by me and I
8 intended it to be hosting images as in
9 physically in our CMS, not links. Linking to
10 stories is a separate thing.

11 Q. So you're saying that publish could
12 be read in this context to mean either hosting
13 or displaying?

14 MS. WOLFF: Objection.

15 A. I mean, we're talking about
16 definitions. That's not what this was intended
17 for.

18 Q. Sure. But you wrote this, right?

19 A. Correct. And it was with relation
20 to physical images being posted up to our
21 website. I mean, the first line of the
22 document in number 1 was "Downloading an
23 image." You wouldn't download an embed.

24 Q. Okay. So is it -- do you want to
25 scroll to the top and you can tell me what

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1 you're referring to?

2 A. Number 1 post bullet one: "Each
3 download comes with a one-time license."
4 Re-download I do believe I used the word
5 "download" a number of times.

6 Q. Sure. In paragraph -- I see that in
7 paragraph 1?

8 A. Correct.

9 Q. And I see in paragraph 2 "Press
10 Images," which I don't see any reference to
11 download. Do you?

12 A. I didn't feel like it was necessary.
13 It was already stated in the previous one.

14 Q. In paragraph 3 I don't have any
15 reference to download or hosting or anything.
16 Do you?

17 A. No.

18 Q. Okay.

19 A. Although I do refer to screen grabs,
20 which would be a physical image.

21 Q. Did you ever think given the
22 potential ambiguity in a word like "publish"
23 that you indicate in the only social media
24 guidelines used at Newsweek, that you're
25 referring to display as opposed to hosting

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1 here?

2 MS. WOLFF: Objection.

3 A. I'm not a lawyer. We did hold
4 classes around this document and I think it was
5 very clear within that class what we were
6 talking about.

7 Q. Do you recall ever thinking to
8 consult with a lawyer about some of the words
9 and some of the language in this agreement or
10 any of the language in the agreement?

11 A. I did provide this to Yuliya. He
12 usually handles legal matters. So if there --
13 and I asked for guidance, if they thought any
14 changes should be made to the document.

15 Q. Okay. So just so we're on the same
16 page, it's your testimony under oath that when
17 you write, quote, "We must request permission
18 for every image we publish," you're referring
19 to only articles that are displayed on the site
20 via upload and not displayed on the site via
21 embed. Is that accurate?

22 A. That's my intention, yes.

23 Q. Well, is that the truth?

24 A. Yes.

25 MS. WOLFF: Objection.

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1 BY MR. BURROUGHS:

2 Q. Okay. So then you write: "This is
3 work on the front end but will save us
4 thousands of unnecessary costs in legal fees."

5 What are you referring to there?

6 A. If someone were to use an image and
7 upload it to our site without that
8 photographer's permission, it opens us up to
9 problems.

10 Q. Okay. Now, do you believe that even
11 that conduct would violate your social media
12 guidelines?

13 A. Could you rephrase?

14 Q. Sure. You said it would open you up
15 to problems. So I'm wondering if you think
16 that that would be a violation of these
17 guidelines or if you just think that would,
18 quote, open you up to problems?

19 A. I mean, if you took an image without
20 permission and uploaded it to our website
21 through our CMS, that would be against our
22 guidelines.

23 Q. Okay. So let me ask you this
24 question: When a viewer, and I know you said
25 you don't regularly read Newsweek.com, but if a

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1 regular viewer of Newsweek.com went to the
2 website to read the articles, does the image
3 itself look any different whether or not it's
4 uploaded directly by Newsweek or embedded?

5 A. Yes.

6 MS. WOLFF: Objection.

7 BY MR. BURROUGHS:

8 Q. In which ways?

9 A. If it's embedded, it shows within --
10 it's like -- embedding an image is essentially
11 a window to another website. So it would look
12 like it would look on Instagram or Twitter or
13 whoever, whatever the embed link was for.

14 Q. Sure. But please -- I understand
15 that, but listen to my question and answer the
16 question I'm asking because it's slightly
17 different.

18 The photograph itself, does it appear
19 any differently to the viewer on Newsweek.com
20 when it's uploaded directly as opposed to
21 embedded?

22 MS. WOLFF: Objection to form. You
23 can answer.

24 A. The image itself doesn't change, but
25 the context with which it's displayed.

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1 Q. Okay. So is it fair to say that the
2 image itself when appearing on Newsweek.com via
3 either embed or direct upload appears exactly
4 the same?

5 MS. WOLFF: Objection.

6 A. The context looks different. It
7 doesn't -- if you were to upload an image, it
8 wouldn't show -- look like it was on Instagram.

9 Q. Again, you're answering a slightly
10 different question, so that maybe you don't
11 want to answer my question, but let me ask it
12 one more time and just try to answer the
13 question. Okay?

14 When a viewer goes to Newsweek.com and
15 views a photograph on Newsweek.com, does the
16 photograph itself appear any different to the
17 viewer depending on whether it's uploaded
18 directly on Newsweek.com or embedded from
19 Instagram?

20 MS. WOLFF: Objection. Asked and
21 answered.

22 A. The photograph looks the same, but
23 the context is not the same.

24 Q. So the photograph looks exactly the
25 same, correct?

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1 A. We don't make changes to the image.

2 Q. So it looks exactly the same as it
3 appeared on Instagram?

4 MS. WOLFF: Objection to the form.
5 You've asked her now five times. She's
6 answered to the best she can. Just move on.

7 BY MR. BURROUGHS:

8 Q. Does the photograph look exactly the
9 same as it does -- as appearing on Instagram?

10 MS. WOLFF: Objection to form.

11 A. Yes. The image looks the same, but
12 the context is different.

13 MR. BURROUGHS: Okay. We've been
14 going for an hour and a half so let's take a
15 quick five-minute break and then we'll come
16 back on the record.

17 MS. WOLFF: Can we take ten minutes,
18 please?

19 MR. BURROUGHS: Sure.

20 (At this point in the proceeding, a
21 recess is taken from 2:34 p.m. to 2:45 p.m.)

22 BY MR. BURROUGHS:

23 Q. So back on the record. Ms. Rice,
24 you understand you're still under oath?

25 A. Yes.

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1 Q. Okay. So let's direct our attention
2 to paragraph 13 of your social media
3 guidelines. Do you see paragraph 13?

4 A. Yes.

5 Q. And I want to direct your attention
6 within that paragraph to the following
7 language, quote: When it comes to
8 user-generated content, exclusive interviews
9 etc., you absolutely cannot take it. You need
10 permission.

11 Do you recall writing that?

12 A. Yes.

13 Q. And why did you write that?

14 A. Because there was an issue with the
15 screenshots.

16 Q. Okay. Now, in the sentence, you
17 call it, quote, user-generated content. What
18 does that mean to you?

19 A. Someone created the visual.

20 Q. Okay. So user-generated content
21 would be visuals created by users?

22 A. Yeah.

23 Q. Okay. And then you indicate that
24 such visuals for the Newsweek team, they
25 absolutely cannot take it. Do you see that?

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1 A. Yes.

2 Q. Okay. Now, is it your position that
3 when writing this, you were referring only to
4 screenshots and not to all user-generated
5 content?

6 A. This was specifically in relation to
7 screenshots from video.

8 Q. So is it your testimony that that
9 sentence relates only to screenshots from
10 video?

11 A. That's what the paragraph is meant
12 for.

13 Q. Okay. And then it says, quote, You
14 need permission. Do you see that?

15 A. Uh-huh. I do.

16 Q. Okay. So is it your testimony that
17 you're advising the Newsweek team that they
18 needed permission to use user-generated content
19 only when that content was a screenshot?

20 MS. WOLFF: Objection.

21 A. This is in relation to
22 user-generated content from videos and taking a
23 screenshot from that.

24 Q. So is my statement correct?

25 MS. WOLFF: Objection.

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1 A. If you're referring to
2 user-generated taking screenshots from video
3 and user -- user-generated video.

4 Q. Well, I'm just reading, you know,
5 your language and it says, "When --

6 MS. WOLFF: Objection.

7 BY MR. BURROUGHS:

8 Q. -- "When it comes to user-generated
9 content."

10 Do you see that?

11 A. Yes.

12 Q. And it doesn't say "screenshot,"
13 correct?

14 A. The paragraph is about screenshots
15 from video.

16 Q. Understood. But that sentence says
17 user-generated content, correct?

18 MS. WOLFF: Objection.

19 A. Yes, in reference to video.

20 Q. And then it gives an example of
21 "exclusive interviews."

22 Do you see that?

23 A. Yes.

24 Q. Okay. And then it says, "You
25 absolutely cannot take it."

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1 Do you see that?

2 A. Yes.

3 Q. Now, there's nothing in here that
4 relates to whether or not you can take it with
5 an embedding process, correct?

6 A. Correct.

7 Q. Okay. And there's nothing in here
8 that narrows user-generated content to only
9 screenshots, correct?

10 MS. WOLFF: Objection.

11 A. The headline of the paragraph is
12 Screenshots from Video. This is specifically
13 related to that.

14 Q. Okay. And you see the example
15 "exclusive interviews," correct?

16 A. Yes.

17 Q. Okay. And the next paragraph 14
18 says, "When in doubt contact the photo
19 department."

20 Do you see that?

21 A. Yes.

22 Q. Do you know if any Newsweek team
23 members ever contacted the photo department
24 about the social media guidelines?

25 A. I do occasionally get questions from

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1 writers regarding use of images and that
2 includes social media.

3 Q. Have any of them ever indicated to
4 you that they were contacting you because they
5 had a question about your social media
6 guidelines?

7 A. Occasionally it happens.

8 Q. When was the last time that
9 happened?

10 A. Maybe a few weeks ago.

11 Q. And what was the question?

12 A. I can't remember the specific
13 question, but someone might have asked me --
14 they needed an image of a specific person and
15 they want to know if it's okay to use something
16 from social media.

17 Q. Okay. And what did you tell them?

18 A. If they want to host the image in
19 our CMS and upload it, you must have
20 permission.

21 Q. Did you tell them if they wanted to
22 embed it, they did not need permission?

23 A. I don't recall telling them that.

24 Q. Okay. Tell me the name of the
25 person you're talking to.

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1 A. I can't recall. I get -- we have
2 many writers and I can't recall.

3 Q. So you had this conversation a
4 couple of weeks ago and you don't remember the
5 person's name. Is that accurate?

6 A. Yes.

7 Q. And you're under oath?

8 A. I can't recall. I could probably
9 look it up, but I can't recall at this moment.

10 Q. Where would you go to look that up?

11 A. I'd see if I had a Slack
12 conversation that was still active.

13 Q. When is the last time you can recall
14 the person's name that you spoke to after they
15 inquired about the social media guidelines?

16 A. I can't recall.

17 Q. So as you sit here today, you can't
18 recall the name of a single person that you
19 ever spoke to regarding the social media
20 guidelines, correct?

21 MS. WOLFF: Objection.

22 A. Not off the top of my head. Like I
23 said, we have many writers and it's difficult
24 to keep track of all their names. I'm not
25 particularly great at remembering everyone's

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1 name.

2 Q. Okay. In the future iterations of
3 your social media guidelines, did you remove
4 this paragraph 13?

5 A. No.

6 Q. Have you ever removed any of the
7 language from paragraph 13?

8 A. No.

9 Q. Okay. Do you recall what, if
10 anything, that you ever removed from the
11 numbered paragraphs in these guidelines?

12 A. There was an earlier iteration that
13 had an e-mail address requesting people to send
14 their permissions, approvals, to that e-mail
15 address. That was removed.

16 Q. Okay. Do you recall any substantive
17 edits to the guidelines themselves?

18 A. Not off the top of my head.

19 Q. Okay. In your copy of this
20 document, how is it titled?

21 A. Probably Photos for Web Use and
22 there would be a date at the top.

23 Q. Is there a reason why that title
24 doesn't appear on this document?

25 A. I don't know.

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1 Q. Okay. So this isn't the actual copy
2 of the document from your files, correct?

3 A. It looks like the same context.
4 It's in the version that I would have provided.

5 Q. Okay. But it's been altered at
6 least to remove the title, correct?

7 A. I mean, I don't see the title in the
8 -- when I'm referring to the title, I mean the
9 name of the actual document. There's been no
10 title removed from this, if we're talking about
11 the header.

12 Q. Okay. Are you referring to the file
13 name for the document?

14 A. The file name for the document, yes.

15 Q. What's your file name for the
16 document?

17 A. It would be something to the effect
18 of photos for web use and the date.

19 Q. Okay. What's the date on this one,
20 if you know?

21 A. I believe this might have been 8/20.

22 Q. So August 2020?

23 A. Yes.

24 Q. Okay. And is this the first
25 iteration of the guidelines to your knowledge?

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1 A. This is not the first.

2 Q. Is it the second?

3 A. I don't believe it's the second.

4 Q. Okay. Did the first or second
5 iteration include that paragraph 13?

6 A. No.

7 Q. So you added that paragraph 13 at
8 some point during your revisions to these
9 guidelines, correct?

10 A. Correct.

11 Q. And that is a substantive revision
12 that you made at some point, correct?

13 A. Yes.

14 Q. Do you recall what spurred you to
15 make that revision?

16 A. There was a question about taking
17 screenshots from videos, so we decided to
18 clarify it.

19 Q. Was Newsweek doing that prior to
20 your clarification of the guidelines?

21 A. I'm sure there had at some point
22 been a screenshot from a video.

23 Q. Okay. Does Newsweek maintain its
24 own internal library of photography?

25 A. We have a CMS system where all

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1 images are uploaded to and that's where they
2 live. I don't know if I'd necessarily call it
3 a library.

4 Q. And are some or all those photos
5 proprietary Newsweek photos, by which I mean
6 photographs for which Newsweek owns the
7 copyright?

8 A. There probably are some images that
9 we might hold the copyright to that exist in
10 our CMS, yes.

11 Q. Okay. How is it demarcated in the
12 CMS to reflect photographs that Newsweek owns
13 the copyright for and for third-party work?

14 MS. WOLFF: Objection. Outside the
15 scope.

16 A. Typically, if we own it, it might
17 say for Newsweek in the credit.

18 Q. Is the credit in the metadata?

19 A. Yeah, it would be in the file.

20 Q. Got it. Got it. Okay. We're going
21 to put Exhibit 3 in front of you, which is
22 going to be Newsweek 104 and 105.

23 (Exhibit 3 marked for
24 identification.)

25 ///

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1 BY MR. BURROUGHS:

2 Q. Take a moment and tell me if you
3 recognize this document. Scroll all the way to
4 the bottom.

5 A. I recognize it, yes.

6 Q. Okay. What is this document?

7 A. It's an earlier iteration of our
8 guidelines.

9 Q. Okay. And how can you tell it's an
10 earlier iteration?

11 A. It doesn't have the thirteenth
12 paragraph and there's some minor changes.

13 Q. Okay. So comparing this exhibit
14 with the one prior, does it refresh your
15 recollection as to when you added paragraph 13
16 relating to screencaps?

17 A. I need to double-check dates of when
18 I added that iteration. I'm not sure of the
19 specific date.

20 Q. Okay. And other than adding the --
21 we'll call it paragraph 13, do you recall
22 adding anything else to this particular
23 iteration of the guidelines that's substantive?

24 A. I need to compare it to other ones.
25 I don't know of any other substantive changes,

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1 additions.

2 Q. Okay. And you indicated earlier
3 that part of the in-house rights training that
4 took place in Newsweek, was it a Getty seminar;
5 is that accurate?

6 A. One of them was a Getty seminar. I
7 hosted one, or at least one. I think I held
8 two.

9 Q. Okay. Was it your decision to hold
10 the Getty seminar?

11 A. They offered it to us and we
12 accepted.

13 Q. Okay. Do you recall when the first
14 one of those took place?

15 MS. WOLFF: Objection.

16 A. You mean the Getty one or one that
17 I've held?

18 Q. The Getty.

19 A. We've only held one with Getty.

20 Q. Okay. And when was that held
21 approximately?

22 A. I know it was in 2019. Might have
23 been the fall. I believe you have the dates
24 somewhere in the documents we provided.

25 Q. Okay. Do you recall if that Getty

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1 seminar included any information about
2 embedding material from social media without
3 the creator's consent?

4 A. I don't recall that specific
5 instance being covered. It might have been,
6 but I don't recall.

7 Q. Okay. And you indicated you
8 yourself had at least one seminar for the team
9 dealing with intellectual property?

10 A. Yes.

11 Q. Okay. Did that seminar include any
12 conversation regarding embedding?

13 A. Yes.

14 Q. Okay. What was discussed in that
15 regard during that conference?

16 A. It was discussed that if it was
17 within context of the story, and you weren't
18 taking it -- we're not taking a screenshot or
19 hosting it on our site, that Instagram allowed
20 for that.

21 Q. And when did that conference take
22 place?

23 A. Probably would have been the early
24 winter of -- sorry, early spring of 2019.

25 Q. Okay. And that conference was led

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1 by you?

2 A. Yes.

3 Q. And was that -- the information you
4 gave there based entirely on your personal
5 experience?

6 A. Yes.

7 Q. Okay. Was any lawyers at that
8 meeting?

9 A. Not that I'm aware of.

10 Q. Okay. Did you seek any legal input
11 before holding that meeting?

12 MS. WOLFF: Objection.

13 A. Like I said previously, I've shown
14 this document to the person I usually talk with
15 about legal matters and I always ask for
16 feedback if they have any.

17 Q. Sure. And I'm not asking --

18 A. The conversation was based off of
19 this document, so.

20 Q. Okay. Was it based off of anything
21 else?

22 A. These were the points that were
23 covered.

24 Q. Okay. Was it based on anything
25 else?

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1 A. Just my knowledge of the industry.

2 Q. Anything else?

3 A. I believe I've answered the
4 question.

5 Q. No. So you've testified that you
6 gave this training to Newsweek relating to
7 intellectual property and social media use
8 based on your personal knowledge, and I'm
9 asking you is it based on anything else, and
10 you haven't quite answered me yet.

11 MS. WOLFF: Objection. Asked and
12 answered.

13 BY MR. BURROUGHS:

14 Q. Do you want me to ask the question
15 again?

16 A. I thought I answered it. I'm sorry.

17 Q. Not quite yet. So this conference
18 that you gave to the Newsweek team relating to
19 the subject matter of these guidelines, you
20 testified that your guidance during that
21 conference was based on your personal
22 knowledge. Was that guidance based on anything
23 else?

24 A. My -- it was based off of this
25 document, which has been seen by people who

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1 advise us on legal matters and it's based off
2 my experience.

3 Q. Okay. Anything else?

4 MS. WOLFF: Objection. You've asked
5 that three times and she's told you everything.
6 Asking it again will not get, you know,
7 something else.

8 MR. BURROUGHS: Just trying to close
9 the loop here.

10 MS. WOLFF: You closed the loop.
11 You asked that same question three times and
12 she told you everything she knows.

13 BY MR. BURROUGHS:

14 Q. Let's go about it a different way.

15 Other than your personal experience
16 and this document that you prepared based on
17 your personal experience, was your instruction
18 to the Newsweek team related to the subject
19 matter based on anything else?

20 MS. WOLFF: Objection.

21 A. It was based off this document and
22 my experience.

23 Q. Was it based on anything else?

24 MS. WOLFF: Objection. Asked and
25 answered.

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1 BY MR. BURROUGHS:

2 Q. You should still respond, if you
3 can.

4 A. I did respond. I'm not sure what
5 you want from me.

6 Q. Okay. Tell me at the end of this
7 question, anything else that this guidance was
8 based on aside from your personal experience
9 and this document that was also based on your
10 personal experience.

11 MS. WOLFF: Objection.

12 A. Well, as I've said, that I've shown
13 this to our legal team and, you know, asked
14 them to review it as well. So I wrote this
15 document up as you're aware and the
16 conversation was based off of this and what I
17 know about the industry.

18 Q. Okay. And I'll give you a chance
19 now. If there's anything else that your
20 guidance is based on, please tell me now.

21 A. I have nothing else to add.

22 Q. Thank you. We're going to now put a
23 document in front of you that we're going to
24 mark as Exhibit 4. It's McGucken 9.

25 ///

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1 (Exhibit 4 marked for
2 identification.)

3 BY MR. BURROUGHS:

4 Q. Take a moment and look at Exhibit 4
5 and tell me if you've seen it before.

6 A. Yes.

7 Q. When was the first time you saw this
8 publication?

9 A. When it was brought to my attention
10 in November of 2019.

11 Q. Okay. And who brought it to your
12 attention?

13 A. Yuliya.

14 Q. Okay. And did she send that to you
15 by e-mail?

16 A. Yes.

17 Q. Okay. And you understand this to
18 reflect the publication we've been discussing
19 today involving Elliot McGucken's photography,
20 correct?

21 A. Yes.

22 Q. Okay. And I believe you testified
23 that you yourself weren't involved in the
24 embedding of this photograph to Newsweek's
25 page, correct?

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1 A. Correct.

2 Q. Do you know who was?

3 A. I don't know. Probably the writer.

4 Q. Okay. If you wanted to figure that
5 out, where would you look?

6 A. You might be able to look in the --
7 our CMS.

8 Q. Okay. Where in your CMS would you
9 look?

10 A. There's an edit page; you need to
11 click on it and you can see the back end of the
12 story.

13 Q. Does that edit page include a copy
14 of the photograph that's being embedded?

15 A. You are able to see it as it shows a
16 rough display of how it would look on the
17 external side.

18 Q. Okay. And when you say "a rough
19 display," what do you mean?

20 A. I believe it includes screenshots of
21 what it would look like, so you'll be able to
22 see that. It doesn't look exactly like it
23 looks on the page here. It's minus ads.

24 Q. Understood. So there is a
25 screenshot of the McGucken photograph used in

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1 the embedding process at Newsweek, correct?

2 A. It would be visible from the back
3 end.

4 Q. Okay. Visible to whom?

5 A. The writers producing the story.

6 Q. Okay. And it's your belief that you
7 can look at that material and ascertain the
8 individual responsible for doing this
9 particular embedding, correct?

10 MS. WOLFF: Objection.

11 A. I'm not sure if it actually would
12 show that. It does show dates of edits to a
13 story, but I'm not sure if it shows
14 specifically who or what the change was. Like
15 I said, I'm not involved with that portion of
16 creation of stories, so I can't speak to it.

17 Q. What is your understanding of how
18 the embed process works?

19 A. You copy a link from Instagram and
20 you paste it into the CMS in the back end of
21 the story.

22 Q. And have you yourself done that?

23 A. I have not, no.

24 Q. Okay. Do you have any experience
25 working with the CMS program?

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1 A. I have experience uploading images
2 to the CMS.

3 Q. Okay. In your own language, how
4 does the CMS transport the linked content from
5 the original host to the display on Newsweek's
6 website?

7 MS. WOLFF: Objection.

8 A. That's outside my purview.

9 Q. Okay. So do you know how the
10 photograph comes to be hosted on Newsweek's
11 CMS?

12 MS. WOLFF: Objection.

13 A. It's via the link. That's all I
14 know.

15 Q. Okay. So your understanding is that
16 the photograph is copied from the link and then
17 hosted on the CMS program on the Newsweek
18 platform; is that correct?

19 MS. WOLFF: Objection.

20 A. Instagram provides a link that
21 allows embedding and that's what's used. They
22 include descriptions [sic] on how to do it on
23 Instagram's website. It's similar to that
24 practice.

25 Q. Have you ever followed those

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1 instructions?

2 A. I have read the instructions, but I
3 haven't personally done it.

4 Q. Okay. So is it your understanding
5 that those instructions allow Newsweek to copy
6 the photograph via the link and then host it on
7 the Newsweek platform?

8 MS. WOLFF: Objection.

9 A. Yes.

10 Q. Okay. Now, when you're looking at
11 the data in CMS on the back end, other than a
12 copy of the photograph that's being imported
13 from Instagram --

14 MS. WOLFF: Objection to form.

15 BY MR. BURROUGHS:

16 Q. -- and the link data, what other
17 information is there?

18 MS. WOLFF: Objection to form.

19 A. I'm not sure I understand the
20 question.

21 Q. Okay. Well, what else other than
22 what we talked about so far, what do you see
23 when you go into the back end?

24 A. I'm not sure what you're getting at.

25 Q. Okay. Well, have you ever looked in

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1 the back end yourself?

2 A. I mean, I know what it looks like
3 once you go in to edit a story and what it
4 looks like. I mean, it's like I said, it
5 essentially looks like what you see here minus
6 the ads and there's boxes. It looks boxy -- I
7 mean, we provided screenshots of exactly what
8 it looks like. You can reference those. It
9 would be easier if you looked at those versus
10 me trying to describe it.

11 Q. Okay. Is it fair to say that
12 without relying on the document, you don't have
13 any personal knowledge of how that process
14 works?

15 A. I'm not involved with the creation
16 of the website and the back-end data on what
17 makes it function. I couldn't speak to that.

18 Q. Understood. That's because your
19 experience or your involvement with the website
20 itself is actually limited, correct?

21 A. It's limited to uploading and --
22 yes.

23 Q. Okay. During your tenure at
24 Newsweek, have you worked with David Sim?

25 A. Yeah, we corresponded.

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1 Q. Okay. To your understanding, what
2 is David Sim's position at the company?

3 A. He was a photo editor.

4 Q. Okay. Did you work closely with
5 him?

6 A. Not closely. He was based out of
7 the London office. We correspond on occasion,
8 but we weren't direct.

9 Q. Did you ever confer with him
10 regarding your social media guidelines?

11 MS. WOLFF: Objection.

12 A. I probably would have shared it with
13 him when I was first writing them. I don't
14 recall the date that he left, so I'm not sure.

15 Q. At a certain point was he the one
16 that people were supposed to contact if they
17 had any questions about the guidelines?

18 A. If that was in the London office.

19 Q. Okay. So is it partitioned that way
20 that there's different guidelines for the
21 different offices, U.S. and London?

22 A. To my knowledge they're the same.

23 Q. Okay. Is there anything in your
24 guidelines or in the Newsweek company policy in
25 general that relates to the different laws in

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1 the U.K. versus the U.S. relating to the use of
2 third-party content?

3 MS. WOLFF: Objection.

4 A. Sorry, you were breaking up on that
5 question.

6 Q. Okay. Is there anything in your
7 social media guidelines or Newsweek's policies
8 in general that addresses any differences
9 between the legal ramifications of using
10 third-party content in the U.S. versus the
11 U.K.?

12 A. We have the same guidelines for
13 both, both offices.

14 Q. Okay. So Newsweek did not have the
15 artist's consent to post the photograph we're
16 looking at here on Exhibit 4, correct?

17 MS. WOLFF: Objection.

18 A. He did not -- he did not
19 specifically give us permission to include the
20 link.

21 Q. Okay. And did Newsweek have any
22 conversations or communications with
23 Mr. McGucken whereby he gave any sort of
24 consent for the use?

25 MS. WOLFF: Objection.

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1 A. To my knowledge, the writer reached
2 out, and from what I understand he didn't
3 respond.

4 Q. Okay. So here is it accurate to say
5 that Newsweek reached out to Mr. McGucken to
6 obtain consent to use his content on their
7 website?

8 MS. WOLFF: Objection.

9 A. From what I understand, they reached
10 out to be able to have a hard copy and host the
11 image on our site.

12 Q. And what's that understanding based
13 on?

14 A. A message that was sent to the
15 photographer.

16 Q. Does that message indicate a request
17 for a hard copy?

18 A. That was what it implied based on
19 what I saw.

20 Q. How did that imply that?

21 A. If you could pull up the screenshot,
22 I could better speak to it.

23 Q. Okay. But as you sit here today,
24 you have no independent recollection of that
25 implication?

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1 MS. WOLFF: Objection.

2 A. I'm sorry, what was the question?

3 Q. We can move on. Mr. McGucken did
4 not consent to this use, correct?

5 MS. WOLFF: Objection.

6 A. We didn't request permission to
7 embed the image because permission is not
8 required to embed images.

9 Q. Did Mr. McGucken respond providing
10 any sort of consent for Newsweek to use his
11 work?

12 MS. WOLFF: Objection.

13 A. I'm not aware of any response that
14 he made.

15 Q. Okay. Is it a business practice of
16 Newsweek to use content from photographers
17 after Newsweek reaches out to that photographer
18 for consent and the photographer does not
19 consent?

20 MS. WOLFF: Objection.

21 A. Our guidelines say that if we're
22 going to host a hard copy of an image,
23 permission is necessary.

24 Q. Okay. But in this case, where
25 Newsweek reached out to the photographer to

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1 request consent to use his work, the
2 photographer declined to grant that consent,
3 the work was used notwithstanding the fact that
4 he did not provide the consent, correct?

5 MS. WOLFF: Objection.

6 A. I'm not sure I understand the
7 question.

8 Q. Okay. So you admit that Newsweek
9 did contact Mr. McGucken requesting some sort
10 of consent to use this work, correct?

11 MS. WOLFF: Objection.

12 A. Like I said, to my knowledge, the
13 writer did reach out to the photographer.

14 Q. To your knowledge, the photographer
15 did not grant to Newsweek any consent; isn't
16 that so?

17 A. To my knowledge, the photographer
18 didn't respond.

19 Q. And yet Newsweek used the content
20 for which it sought permission even
21 notwithstanding this lack of response, correct?

22 MS. WOLFF: Objection.

23 A. Permission is not required to embed
24 an image.

25 Q. That's -- remember, you have to

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1 answer my question. I understand these answers
2 and what you're testifying to, but they're
3 simply not responsive to the question. So
4 please listen closely to the question and try
5 to answer the question I'm asking you. Okay?

6 A. Okay.

7 Q. So after not receiving a response
8 from Mr. McGucken relating to the use of this
9 photography, Newsweek, notwithstanding that
10 lack of response, displayed the photography
11 anyway, correct?

12 MS. WOLFF: Objection.

13 A. Correct.

14 Q. Okay. And is it a practice of
15 Newsweek to do that, to reach out for consent
16 from photographers, and if they decline
17 consent, Newsweek uses the content anyway?

18 MS. WOLFF: Objection.

19 A. If a photographer declines or tells
20 us explicitly they don't want us to use their
21 content, we are unlikely to use it.

22 Q. But if they do not respond, is it
23 Newsweek's practice to use the material that
24 they sought consent for notwithstanding the
25 fact there was no response?

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1 MS. WOLFF: Objection.

2 A. If it was an embed, no response is
3 necessary.

4 Q. Okay. So it's fair to say then that
5 it's Newsweek's practice to reach out to
6 photographers in search of consent and if
7 consent isn't given, Newsweek will then just
8 embed their photography anyway, correct?

9 MS. WOLFF: Objection.

10 A. We don't have a policy against
11 embedding images. We wouldn't take an image
12 without a photographer's permission and upload
13 it to our site.

14 Q. Okay.

15 A. But embedding is not -- is allowed
16 as per Instagram's terms.

17 Q. Okay. So even after a photographer
18 declines to grant consent, it's Newsweek's
19 practice to display their photography anyway by
20 the embedding process, correct?

21 MS. WOLFF: Objection.

22 A. If a photographer were to tell us
23 they don't want us to use their visuals it's --
24 unless there was a really strong newsworthy
25 reason to do so that fell under fair use, we'd

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1 likely respect the photographer's wishes, but,
2 you know.

3 Q. So is it Newsweek's practice when a
4 photographer declines their request for consent
5 to still use the work anyway as an embed?

6 MS. WOLFF: Objection.

7 A. If a photographer asked us not to
8 use an image, we are unlikely to use that
9 image.

10 Q. I understand that. You said that a
11 couple of times, but you have to respond to the
12 question I'm asking. Okay?

13 A. Are you simply wanting me to say yes
14 or no?

15 MS. WOLFF: Objection.

16 BY MR. BURROUGHS:

17 Q. That would be helpful, but what I'm
18 asking you is what happens in cases where
19 there's no response? You're responding telling
20 me, Well, here's what happens if they say no,
21 okay, but that's not my question. So please
22 listen carefully to the question; otherwise
23 there's going to be issues with the record.

24 MS. WOLFF: Objection.

25 BY MR. BURROUGHS:

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1 Q. First and foremost, just one more
2 time. In situations where Newsweek reaches out
3 to the photographer to request consent to use
4 their work, and the photographer does not
5 respond, is it Newsweek's practice to use that
6 material anyway through the embedding process?

7 MS. WOLFF: Objection.

8 A. It's possible we would do that.

9 Q. Okay. And doing so would not
10 violate Newsweek's social media guidelines,
11 correct?

12 A. Embedding images does not violate
13 the guidelines that I had written out.

14 Q. Okay. And that's the case even if
15 the photographer declines a request for consent
16 or doesn't respond to a request for consent,
17 correct?

18 MS. WOLFF: Objection.

19 A. Declining and not responding aren't
20 the same thing.

21 Q. So is it your testimony that if the
22 photographer does not respond to a request for
23 consent, Newsweek takes that as consent to use
24 the work on its website?

25 MS. WOLFF: Objection.

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1 A. We would embed -- we embed images.

2 Q. So it's Newsweek's business practice
3 when it is unable to obtain consent to simply
4 embed the image at issue; is that correct?

5 MS. WOLFF: Objection.

6 A. If the image is newsworthy and in
7 relation to the story, embedding images is
8 allowed as per our practice.

9 Q. And your practice at Newsweek is to
10 do so even when you've directly contacted the
11 photographer and they did not respond providing
12 consent, correct?

13 MS. WOLFF: Objection. Asked and
14 answered.

15 A. No permission is required when it
16 comes to embedding images.

17 Q. And that's your position
18 irrespective of whether you've asked for
19 consent or received consent, correct?

20 MS. WOLFF: Objection.

21 A. I'm sorry. Can you repeat the
22 question?

23 Q. Okay. Your position is that --
24 well, strike that.

25 Is it Newsweek's practice to use

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1 material from third parties, after seeking
2 consent and not obtaining it, via the embed
3 process?

4 MS. WOLFF: Objection.

5 A. If it falls under fair use.

6 Q. Is that the only circumstance?

7 A. That I'm aware of.

8 Q. Okay. So if it's not fair use,
9 Newsweek will not use third-party content that
10 they've sought permission for and not obtained?

11 MS. WOLFF: Objection.

12 BY MR. BURROUGHS:

13 Q. Is that accurate?

14 MS. WOLFF: Objection.

15 A. We only use images that relate to
16 our stories.

17 Q. In situations other than fair use
18 situations, is it Newsweek's policy to use
19 third-party content that it sought consent for
20 and did not receive?

21 MS. WOLFF: Objection.

22 A. Instagram doesn't require permission
23 to embed images.

24 Q. Again, I'm not asking about
25 Instagram. I'm asking about your company

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1 policies. So you keep telling me what
2 Instagram guides, but I'm asking about your
3 company policies.

4 A. We follow Instagram's policies.

5 Q. How do you ensure that you follow
6 Instagram's policies?

7 A. We've read their policy and I'm
8 familiar with industry standards.

9 Q. Other than reading their policy, how
10 does Newsweek ensure that it follows that
11 policy?

12 MS. WOLFF: Objection.

13 BY MR. BURROUGHS:

14 Q. I just want the record to reflect
15 that time is going by without an answer.

16 A. I mean, I'm not sure what you want
17 me -- would you rephrase the question one more
18 time, please?

19 Q. Sure. You told me that you followed
20 Instagram's policies, I asked you how, and you
21 said you read them. And I asked, Well, do you
22 do anything else at Newsweek to ensure that you
23 follow those policies, and you sat there for a
24 while without answering.

25 A. We hold classes regularly to inform

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1 people what the current industry standards are.

2 Q. Does that have anything to do with
3 Instagram?

4 MS. WOLFF: Objection.

5 BY MR. BURROUGHS:

6 Q. Are you looking at the screen or --

7 A. What is the current question?

8 Q. -- are you typing? I can't tell
9 what's happening.

10 A. I'm sitting here. I'm trying to
11 understand what you want from me.

12 Q. Sure. I'll ask one more time.

13 MS. WOLFF: Objection.

14 BY MR. BURROUGHS:

15 Q. I asked if Newsweek does anything
16 else aside from reading Instagram's terms in
17 order to ensure that they comply with those
18 terms?

19 A. Well, I'm not sure what else could
20 be done.

21 Q. Okay. Then you can just tell me we
22 don't do anything other than read them.

23 MS. WOLFF: Objection.

24 BY MR. BURROUGHS:

25 Q. Is that your answer?

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1 A. I mean, yes. I read the policy --

2 MS. WOLFF: You're badgering the
3 witness right now. Okay? Let the record
4 reflect that he's badgering the witness.

5 BY MR. BURROUGHS:

6 Q. Has Newsweek ever violated any of
7 Instagram's terms?

8 A. Not to my knowledge.

9 Q. And is it fair to say that it's
10 Newsweek's policy, even in cases where it
11 reached out to the photographer to request
12 consent to use their work and having not
13 received that consent, Newsweek will still
14 publish and display that consent [sic] via the
15 embed process?

16 MS. WOLFF: Asked and answered.

17 A. By what consent? I'm sorry, I don't
18 understand what you mean by that question.

19 Q. So you've testified that Newsweek
20 reached out to Mr. McGucken to request his
21 consent to use his photography, correct?

22 A. Yes.

23 Q. And you've testified that Mr.
24 McGucken did not give that consent, correct?

25 A. I testified that he did not respond.

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1 Q. Correct. And you testified that
2 Newsweek, notwithstanding the fact that he
3 didn't respond, just went ahead and published
4 his photography, correct?

5 MS. WOLFF: Objection.

6 A. Permission is not required for
7 embedding an image --

8 Q. And I'm not asking you whether or
9 not --

10 A. -- so we did not --

11 MS. WOLFF: Objection. You're
12 putting words in her mouth.

13 MR. BURROUGHS: Not correct.

14 MS. WOLFF: She did not use the word
15 "publish." Please let her answer the question.
16 If she can't answer yes or no, she has to
17 explain.

18 A. You need to repeat the question
19 again.

20 Q. Sure. So, and I don't want to put
21 words in your mouth, but I believe you
22 testified that Newsweek admits that it
23 contacted Mr. McGucken to request a right to
24 use his photography. And I believe you
25 testified that Mr. McGucken did not respond to

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1 provide that consent. And I believe you
2 testified that Newsweek published the
3 photography anyway. Is that accurate?

4 MS. WOLFF: Objection.

5 A. We requested permission to have a
6 hard copy and host that image on the website.
7 That was the request. We did not get a
8 response from the photographer and we instead
9 decided to include a link as per what's allowed
10 by Instagram's policy and that is what
11 happened.

12 Q. And so Newsweek did display
13 Mr. McGucken's photograph on its website after
14 he declined to provide consent, correct?

15 MS. WOLFF: Objection. You're using
16 legal terms.

17 A. The image was visible on our website
18 via an Instagram link.

19 Q. Okay. And is it in accord with
20 Newsweek's policies and practices to display
21 photography on its website after it has reached
22 out to the photographer for that photograph and
23 not receive consent?

24 MS. WOLFF: Objection.

25 A. We include Instagram links on our

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1 website and we don't always seek permission.

2 Q. And in cases where you do seek
3 permission and don't receive it, is it your
4 practice to use the work anyway?

5 MS. WOLFF: Objection.

6 A. I've answered the question. I don't
7 understand what else I can add.

8 Q. It's a yes-or-no question, so I'm
9 not really looking for much else other than yes
10 or no?

11 MS. WOLFF: Objection.

12 A. It's a nuance answer. We include
13 links to Instagram stories. We do not host
14 images in our CMS without permission.

15 Q. Let me ask it this way: The article
16 that you see in Exhibit 4, it's undisputed that
17 Newsweek reached out to Mr. McGucken and asked
18 for some sort of consent, correct?

19 A. Correct.

20 Q. And it's undisputed that
21 Mr. McGucken did not give Newsweek any consent,
22 correct?

23 A. He did not respond.

24 Q. So did you take that lack of
25 response to be consent?

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1 MS. WOLFF: Objection.

2 A. We asked for permission to host the
3 image. We did not hear back, so we did not
4 host the image in our site; therefore, we
5 included a link. They are two different
6 questions.

7 Q. Well, when you include a link, are
8 you displaying the Instagram content?

9 A. Correct.

10 MS. WOLFF: Objection. That calls
11 for a legal conclusion.

12 MR. BURROUGHS: Madam Court
13 Reporter, did you get the answer?

14 THE REPORTER: Yes.

15 BY MR. BURROUGHS:

16 Q. Okay. So here you are displaying
17 McGucken's photograph on Newsweek, correct?

18 MS. WOLFF: Objection. Legal
19 conclusion.

20 BY MR. BURROUGHS:

21 Q. Do you understand the question? I'm
22 happy to rephrase it.

23 A. Please rephrase.

24 Q. Sure. Did Newsweek display
25 Mr. McGucken's photograph?

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1 MS. WOLFF: Objection.

2 A. It was visible on our website, yes.

3 Q. Okay. What's your definition of
4 display?

5 MS. WOLFF: Objection.

6 A. There's multiple definitions of
7 display.

8 Q. Okay. Can you give me yours based
9 on your industry experience?

10 A. What you can see.

11 Q. Okay. So per your definition, is it
12 possible for you to see McGucken's photograph
13 on the Newsweek website?

14 MS. WOLFF: Objection.

15 A. You can see it on our website, yes.

16 Q. Okay. So then it is fair to say
17 that the Newsweek website displayed Mr.
18 McGucken's photograph, correct?

19 MS. WOLFF: Objection.

20 A. Yes.

21 Q. Okay. And Newsweek displayed
22 Mr. McGucken's photograph despite the fact that
23 he had never affirmatively consented to that
24 display, correct?

25 MS. WOLFF: Objection.

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1 A. As I've stated, there's two
2 questions at hand. We asked for permission to
3 have a hard copy. He didn't respond, so we
4 included a link. We didn't ask permission to
5 include a link to his Instagram page.

6 Q. So is it your understanding that his
7 failure to respond to your request gave you a
8 -- was it implied consent or was it some other
9 type of consent to embed?

10 A. We don't need permission to embed.
11 We didn't ask for permission for an embed.

12 Q. Understood. So is it Newsweek's
13 position that it can embed photographers' work
14 even in situations where they've reached out to
15 that photographer for any type of consent?

16 MS. WOLFF: Objection.

17 A. As I've stated, we wouldn't host an
18 image -- we wouldn't take a hard copy of an
19 image and host that without permission, but we
20 would include a link to an Instagram page.

21 Q. And that link would display the
22 photograph on Newsweek's site, correct?

23 A. Correct.

24 MS. WOLFF: Objection.

25 A. Correct.

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1 Q. Okay. And you'll do that even in
2 cases where you've reached out to the
3 photographer and not heard back, correct?

4 MS. WOLFF: Objection. Asked and
5 answered.

6 A. I have answered the same question
7 several times. I'm not sure what more I could
8 add.

9 Q. Okay. Let me ask you this: Does
10 it, under Newsweek's business practices, affect
11 in any way whether or not Newsweek decides to
12 display somebody's photograph via an embed
13 whether or not Newsweek has reached out to them
14 and/or heard a response from them in regards to
15 the use of the photograph?

16 MS. WOLFF: Objection.

17 A. I've answered your questions
18 already. I'm not sure what else I could add.

19 Q. So I think what you've told me, and
20 tell me if this is wrong, is that it does not
21 affect Newsweek's policy. Newsweek is going to
22 embed a photograph from Instagram even in cases
23 where it's reached out to the artist and asked
24 for consent?

25 MS. WOLFF: Objection.

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1 BY MR. BURROUGHS:

2 Q. Is that incorrect?

3 A. We don't ask for consent for
4 embedded images.

5 Q. But let's say that you did. Let's
6 say that you reached out and asked an author
7 for consent, that author did not respond, would
8 that impact your decision whether or not to use
9 their content?

10 MS. WOLFF: Objection.

11 A. We wouldn't do that. It's not
12 relevant.

13 Q. Can you think of instances where you
14 yourself have corresponded with photographers
15 or artists about using their social media
16 content on your site?

17 A. I can't recall personally doing
18 that.

19 Q. Okay. Do you have any recollection
20 of anybody else at the company ever doing that?

21 A. I'm sure it's been done, but I can't
22 speak to what other people have done
23 specifically.

24 Q. Okay.

25 A. May I take a break for just a

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1 moment? My light is coming in my window and I
2 need to adjust it.

3 Q. Sure. Yeah, we can take a
4 five-minute break. Is that okay?

5 (At this point in the proceeding, a
6 brief recess is taken.)

7 BY MR. BURROUGHS:

8 Q. Okay. You understand you're still
9 under oath?

10 A. Yes.

11 Q. Okay. Now, when Newsweek obtains
12 photographs from Getty, does it pay a license
13 fee for the photographs?

14 A. We have a subscription model with
15 them, so yes.

16 Q. And when Newsweek uses photos from
17 commissioned photographers or even from the
18 reporter that you mentioned earlier who
19 submitted the photograph, does it compensate
20 those parties for use of the photograph?

21 A. We wouldn't compensate a reporter if
22 they're staff. Typically, we wouldn't
23 compensate a reporter, but if it's a
24 commissioned work we would.

25 Q. Okay. Do you recall Newsweek

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1 actually paying independent contractor
2 photographers for use of the work?

3 MS. WOLFF: Objection.

4 A. Yes.

5 Q. Okay. When was the last time you
6 recall that happened?

7 A. The most recent case was the one I
8 described earlier with a medal of the arts
9 recipient.

10 Q. Okay. And what did Newsweek pay for
11 the use of that work?

12 A. \$150.

13 Q. Okay. And do you recall what the
14 terms of use were for that payment?

15 A. It was used for that story in
16 perpetuity.

17 Q. Okay. Online only?

18 A. And print.

19 Q. Okay. Was it used in print?

20 A. Yes.

21 Q. Okay. Do you know if Newsweek --
22 well, let me withdraw the question.

23 Did Newsweek offer to compensate
24 Mr. McGucken for the use of his photograph?

25 MS. WOLFF: Objection.

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1 A. Not that I'm aware of. There was no
2 correspondence with him. So he never
3 responded, so there was no opportunity to do
4 so.

5 Q. Okay. Does Newsweek regularly reach
6 out via social media to ask if it can display
7 or use in some way social media content?

8 MS. WOLFF: Objection.

9 A. It's something that writers do.

10 Q. You're aware of that happening
11 numerous times during your tenure at Newsweek,
12 correct?

13 MS. WOLFF: Objection.

14 A. I don't work directly with these
15 writers, so I can't say how frequently it
16 happens, but I know it happens.

17 Q. And has it happened throughout your
18 tenure at Newsweek?

19 A. As far as I'm aware, it's happened
20 while I've been with the company.

21 Q. Okay. And in those instances, would
22 it also be the understanding that when they're
23 reaching out and asking to use the social media
24 content, they're, in fact, asking for a hard
25 copy to be sent?

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1 A. Typically, when they're reaching
2 out, that's what they're seeking.

3 Q. Okay. To your knowledge, is it
4 possible to send photos via Instagram DM?

5 A. Not to my knowledge.

6 Q. Okay. Have you ever heard of that
7 happening?

8 A. I'm not familiar with that
9 happening.

10 Q. Okay. Do you still have an
11 Instagram account?

12 A. I have an Instagram account.

13 Q. Okay. Do you use it?

14 A. Yes.

15 Q. Okay. Have you ever sent a
16 photograph via -- I'm sorry. Have you ever
17 sent a photograph file via Instagram DM?

18 A. A personal file? It would be a link
19 usually.

20 Q. Okay. So you never sent a hard copy
21 or an actual TIFF or JPEG file via Instagram
22 DM, correct?

23 MS. WOLFF: Objection.

24 A. I don't know how Instagram functions
25 internally or what type of file is being

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1 transferred if I were to send an image to show
2 someone else. I don't know how that process
3 works. I don't know what it would be called.

4 Q. Okay. So you don't recall doing
5 that, correct?

6 A. To my knowledge, I don't know what
7 -- how the file is transferred within
8 Instagram's platform.

9 Q. And you have no knowledge?

10 A. I don't know how to answer that
11 question specific to what you're asking.

12 Q. Okay. And that's because you have
13 no knowledge in that regard, correct?

14 MS. WOLFF: Objection.

15 A. I don't know how Instagram is built.

16 Q. Fantastic. Okay. Does Newsweek
17 have a standard release form that it uses with
18 outside photographers or artists?

19 A. We have a release form, yes.

20 Q. Have you seen that?

21 A. Yes.

22 Q. When is the last time you saw that
23 form?

24 A. I probably looked at it when we were
25 licensing the image for the story which I

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1 referenced earlier.

2 Q. Okay. And what do you recall about
3 the substance of that form?

4 A. It's a pretty simple statement just
5 saying that we're granted permission to use the
6 image within context of that story that we're
7 requesting it for.

8 Q. Okay. And is it Newsweek's practice
9 to have that form signed by third-parties when
10 it uses third-party content?

11 A. If we're hiring someone to do
12 something. It's not always required when we're
13 seeking permission to offer an image that
14 already exists. It's not always required. A
15 simple yes or no is usually sufficient.

16 Q. Okay. So is it fair to say that it
17 is Newsweek's practice to not have a
18 photographer execute just a license when it
19 licenses a photograph to Newsweek?

20 MS. WOLFF: Objection.

21 A. Typically, when someone requests
22 permission to use an image and they respond,
23 Yes, you are allowed to use this image for the
24 story, that's sufficient.

25 Q. And it's fair to say that what

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1 you've just articulated is the Newsweek policy,
2 correct?

3 MS. WOLFF: Objection.

4 A. I'm not sure if I would call it a
5 standard policy, but it is a practice.

6 Q. Okay. Does Newsweek have a policy
7 in that regard?

8 A. It's just our standard function to
9 do things that way.

10 Q. Okay. So if I were to ask you to
11 describe the policy to me, you wouldn't be able
12 to because there is no such policy, correct?

13 MS. WOLFF: Objection.

14 A. It's a pretty standard practice
15 across the industry to do things that way, so
16 it's not really something that warrants being
17 written in stone.

18 Q. To do things which way? To obtain a
19 license? Or to obtain -- go ahead.

20 A. To request an image and for the
21 person to respond affirmatively.

22 Q. Okay. So it's not your
23 understanding that industry practice generally
24 requires the photographer to sign a licensing
25 statement or agreement?

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1 MS. WOLFF: Objection.

2 A. Not for Web use.

3 Q. Okay. And certainly, you're not
4 contest -- you're not asserting that McGucken
5 signed anything or gave any affirmative consent
6 to Newsweek for any purposes here, correct?

7 MS. WOLFF: Objection.

8 A. Not that I'm aware.

9 Q. We got a bit sidetracked, but is it
10 your position that by not responding, he had
11 given Newsweek implied or some other type of
12 consent to use his work?

13 MS. WOLFF: Objection.

14 A. I believe we covered this already.

15 Q. Was that your belief?

16 A. Well, we ask permission to host the
17 image on our site. We didn't hear a response
18 so we did not host the image on our site. We
19 included a link instead, which permission is
20 not necessary for.

21 Q. Okay. And that link displayed the
22 image on Newsweek.com, correct?

23 A. Correct.

24 Q. And you don't believe that your
25 correspondence or lack thereof with

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1 Mr. McGucken authorized that use to the extent
2 it has to be authorized? I understand your
3 position that it doesn't have to be authorized.

4 A. Correct.

5 Q. Okay. Are there any processes in
6 place to ensure that photography is properly
7 licensed or being used properly before it goes
8 live and is published on Newsweek.com?

9 MS. WOLFF: Objection.

10 A. That would probably be a better
11 question for James. He would be able to speak
12 to that.

13 Q. Okay. So it's certainly not your
14 role, correct?

15 MS. WOLFF: Objection.

16 A. I'm not involved with posting the
17 stories, the daily stories. There's hundreds
18 done a day, so I can't speak specifically to
19 that.

20 Q. Okay. And you testified earlier
21 that the writers themselves publish the stories
22 at Newsweek.com, correct?

23 A. Writers or with the approval of
24 editors. It's often more than one person.

25 Q. But a writer can upload an article

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1 directly and it would publish in Newsweek.com
2 without any further approval?

3 MS. WOLFF: Objection.

4 A. As I said, I can't speak to the
5 exact processes of that. That would be a
6 question for James.

7 Q. Okay. Are you aware of anyone at
8 Newsweek that's tasked with reviewing articles
9 to ensure that they don't violate third-party
10 copyrights before they're published on
11 Newsweek.com?

12 MS. WOLFF: Objection.

13 A. As I've said, I don't work
14 specifically with that process.

15 Q. Are you aware of anyone?

16 A. I couldn't speculate.

17 Q. Okay. So are you aware of anyone?

18 MS. WOLFF: Objection.

19 A. Of course, the editors review
20 stories. They would catch errors or anything
21 of concern. I'm sure they would flag it if
22 they saw something.

23 Q. Okay. Which is understandable, but
24 again, listen to my question and try to answer
25 the question that I'm asking. Okay?

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1 MS. WOLFF: Objection.

2 BY MR. BURROUGHS:

3 Q. Is there anyone at Newsweek whose
4 responsibility is to review articles before
5 they're published in Newsweek.com and ensure
6 that they're not violating anyone's copyrights?

7 MS. WOLFF: Objection.

8 A. Any editor assigned to a story would
9 flag a copyright issue if they saw it.

10 Q. Okay. And how do they know whether
11 or not there's a copyright issue as you say?

12 MS. WOLFF: Objection.

13 A. Hopefully, they would refer to my
14 guidelines and the industry professionals with
15 an understanding how copyright works.

16 Q. Okay. So it's Newsweek's
17 understanding that all of its editors and
18 writers have an understanding of how copyright
19 works and they rely on that when approving
20 stories and that's the extent of the approval
21 process?

22 MS. WOLFF: Objection.

23 A. I'm not involved with the hiring
24 practices of the writers and what questions and
25 how they're vetted. I couldn't speak to that.

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1 Q. That's fair. So as far as you know,
2 there's no one at Newsweek whose job is to
3 review these articles to make sure they're not
4 violating a photographer's rights before they
5 go up on the site, correct?

6 A. We have educated writers [sic] that
7 if they saw a problem with a story, I'm sure
8 they would flag it. And if the writer is
9 following our guidelines, they shouldn't be
10 violating copyrights.

11 Q. Understood. And aside from that,
12 there's nothing in place to ensure that the
13 articles are not copyright infringed, correct?

14 MS. WOLFF: Objection.

15 A. Beyond editors reviewing stories and
16 people following guidelines that we have set
17 forth, I'm not aware of any additional levels
18 of checks.

19 Q. Okay. And there's no one at
20 Newsweek whose job title or job
21 responsibilities include reviewing these
22 articles to look at specifically copyright
23 issues, correct?

24 MS. WOLFF: Objection.

25 A. As I've stated before, I can't say

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1 what an editor looks at specifically for a
2 story. I'm not involved in that process.

3 Q. Okay. So it sounds like you're
4 telling me that it's up to the editors
5 basically to look at the content and figure out
6 whether or not there are any copyright issues
7 at Newsweek?

8 A. I'm saying I'm not involved
9 specifically with that process, so I can't
10 speak specifically to what they're doing.

11 Q. Understood. So you're unaware of
12 anything that Newsweek does to review these
13 articles for copyright issues before them being
14 uploaded to Newsweek.com, correct?

15 MS. WOLFF: Objection. And we have
16 designated particular people to speak to
17 particular subjects. I don't see where this is
18 in our list of questions.

19 BY MR. BURROUGHS:

20 Q. Is that correct?

21 A. I've answered the question to the
22 best of my ability.

23 Q. Okay. And you yourself had no
24 involvement whatsoever with the McGucken
25 article that's at issue in this case, correct?

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1 A. As I've stated, I wasn't
2 specifically involved with the posting of this
3 story.

4 Q. Did you have any involvement with
5 the story or its posting?

6 A. I was not involved with the creation
7 of this story.

8 Q. Did you have any involvement
9 whatsoever with the story being created or
10 posted to Newsweek.com?

11 A. I've already answered the question.

12 Q. If you had any involvement with the
13 creation or publication of the article, please
14 tell me that now.

15 MS. WOLFF: Objection.

16 A. I've already answered the question.
17 I was not involved with the posting of this
18 story.

19 Q. And you were not involved with the
20 creation of the story, correct?

21 A. That's saying the same thing. I
22 didn't create the story. I didn't post the
23 story.

24 Q. Okay. So you weren't involved in
25 the creative process, correct?

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1 MS. WOLFF: Asked and answered.

2 BY MR. BURROUGHS:

3 Q. Did you write the story?

4 A. No.

5 MS. WOLFF: You asked her that five
6 times.

7 BY MR. BURROUGHS:

8 Q. Did you choose the photography for
9 the story?

10 A. No.

11 MS. WOLFF: Asked and answered.

12 BY MR. BURROUGHS:

13 Q. Had you even seen the story before
14 this lawsuit arose?

15 MS. WOLFF: Asked and answered.

16 A. As I've stated earlier, the first
17 time I saw the story was in November of 2019.

18 Q. Okay. Have you reviewed any
19 documents that would give you any information
20 or knowledge relating to the creation of the
21 article at issue?

22 A. I believe we covered this already.

23 Q. No.

24 A. We provided the documents that we
25 had available in relation to the creation of

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1 this story.

2 Q. Did you look at any records
3 whatsoever relating to the creation of the
4 McGucken article?

5 A. I've seen some e-mails in relation
6 to this story.

7 Q. You've seen e-mails relating to the
8 creation of the McGucken article?

9 A. Yes.

10 Q. Okay. And aside from those e-mails,
11 did you see any other documents that relate to
12 the creation of the McGucken article?

13 A. Outside of the e-mails that were
14 provided, no.

15 Q. Have you spoken to Ms. Hignett about
16 the creation of the McGucken article?

17 A. No.

18 Q. Do you have any knowledge or
19 information relating to Ms. Hignett's creative
20 decisions in connection with her creation of
21 the McGucken article?

22 MS. WOLFF: Objection.

23 A. I can't speak to her thought
24 process.

25 Q. Okay. As you sit here today, you

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1 simply have no information whatsoever relating
2 to Ms. Hignett's creative process or anything
3 having to do with the creation of the McGucken
4 article, correct?

5 MS. WOLFF: Objection.

6 A. Beyond the creation of our
7 guidelines and the fact that as far as we are
8 aware she followed those guidelines. I wasn't
9 involved with her thought process or her
10 creation of the story.

11 Q. Okay. So other than your knowledge
12 of your guidelines, you have no information
13 relating to the choices made in creating and
14 publishing the McGucken article on
15 Newsweek.com, correct?

16 MS. WOLFF: Objection.

17 A. The first time I saw the story was
18 in November of 2019.

19 Q. Okay. And that was months after it
20 had already gone online, correct?

21 A. I believe it was posted in August.

22 Q. Okay. And so you're unaware of why,
23 for example, Ms. Hignett shows the McGucken
24 photograph to publish on Newsweek.com, correct?

25 MS. WOLFF: Objection.

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1 A. I believe the story was about his
2 photo, so I assume that's why she included it.

3 Q. I understand your assumption, but
4 you don't have any personal knowledge as to why
5 she chose that photograph, correct?

6 MS. WOLFF: Objection.

7 A. As I've said, I can't speak to her
8 thought process on the creation of the story.

9 Q. You can't speak to her creative
10 process at all as it pertains to the McGucken
11 article, correct?

12 A. I don't -- wasn't involved with the
13 creation of this story, so I cannot speak to
14 it.

15 Q. Okay. Do you recall ever conversing
16 or communicating with Ms. Hignett relating to
17 the substance of any of her articles?

18 A. I have worked with her in the past
19 on a previous article.

20 Q. Which article?

21 A. In the story that we ran in the
22 magazine about somebody who had been murdering
23 cats.

24 Q. Okay. So aside from that, which you
25 mentioned earlier, did you ever communicate

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1 with her relating to any other article that she
2 put together?

3 A. It's possible. That's the one that
4 stands out.

5 Q. And do you recall any others other
6 than the cat murderer?

7 A. That's the only one that I could
8 recall off the top of my head, but it's
9 possible we worked together on another story
10 that I'm not thinking of.

11 Q. Okay. Did you ever give her any
12 guidance as to her creative process?

13 A. I provided the document that I
14 created that we reviewed earlier to everyone in
15 the company, so I'm assuming that she would
16 have received a copy.

17 Q. You yourself provided that to her?

18 A. Not directly, but it went to the
19 entire company, so I assume she would have been
20 included on that.

21 Q. Okay. And you're basing that
22 testimony on the fact that you saw an e-mail,
23 correct?

24 A. An e-mail did go out that included
25 that, but it's meant to go to every single

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1 person in the company.

2 Q. Okay. But you don't know as you sit
3 here today whether or not she ever received
4 that social media guideline document, correct?

5 A. I didn't have access to every single
6 person whose name would have been included on
7 that mass e-mail list.

8 Q. And you certainly don't know whether
9 or not she ever read those social media
10 guidelines, correct?

11 MS. WOLFF: Objection.

12 A. I have no way of knowing if she
13 absolutely read them, but she, when she
14 answered one of our earlier e-mails, she spoke
15 as if she was familiar with them.

16 Q. Okay. You never had any
17 conversation with her about the guidelines,
18 correct?

19 A. Not specifically.

20 Q. And you're not aware of anyone at
21 Newsweek ever having any conversation with her
22 about the guidelines, correct?

23 MS. WOLFF: Objection.

24 A. I can't speak to what other people
25 might have spoken to her about.

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1 Q. Okay. And you're not aware of
2 Newsweek ever enforcing any part of the
3 guidelines against Ms. Hignett, correct?

4 MS. WOLFF: Objection.

5 A. I can't speak to what other people
6 might have had conversations with her about.

7 Q. In fact, Newsweek has never enforced
8 these guidelines against any of its writers,
9 has it?

10 MS. WOLFF: Objection.

11 A. I'm not sure I understand what you
12 mean by "enforced."

13 Q. Has Newsweek ever penalized any of
14 its staff members for violating your social
15 media guidelines?

16 MS. WOLFF: Objection.

17 A. I'm not any of the writers'
18 reporting editor, so I wouldn't be involved
19 with that if there were.

20 Q. So as you sit here today, you're not
21 aware of Newsweek ever enforcing these social
22 media guidelines in any way upon any of its
23 team members, correct?

24 MS. WOLFF: Objection. And this is
25 outside of the scope of the contents in your

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1 request.

2 BY MR. BURROUGHS:

3 Q. Go ahead.

4 A. I don't work -- I'm not any of the
5 writers' direct report, so I wouldn't have been
6 involved with enforcing rules upon them. So I
7 can't speak to what another editor would have
8 done to penalize someone or otherwise. I can't
9 speak to that.

10 Q. Understood. So as far as you know,
11 they may or they may not have been enforced at
12 some point?

13 MS. WOLFF: Objection.

14 A. It's outside my purview, so I
15 couldn't speak to it.

16 Q. Okay. So you have no knowledge in
17 that regard, correct?

18 MS. WOLFF: Objection.

19 A. Correct.

20 Q. Okay. Fantastic. Thank you. Do
21 you know if anyone from Newsweek has spoken
22 with Ms. Hignett over the last year or two?

23 A. I wouldn't know.

24 Q. Okay. And you didn't ask anyone at
25 Newsweek whether or not they communicated with

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1 Ms. Hignett relating to this article of
2 dispute, correct?

3 A. I believe there were communications
4 with her regarding this case.

5 Q. And why do you believe that?

6 A. Because I've seen the e-mails, which
7 you have access to as well.

8 Q. Okay. Aside from those e-mails,
9 were there any other conversations or
10 communications that you're aware of?

11 A. I don't know. I'm not familiar with
12 any other conversations that may have happened,
13 but they wouldn't have come from me so I
14 wouldn't be able to speak to that.

15 Q. Okay. So the only contact between
16 Ms. Hignett and Newsweek that you're aware of
17 over the past couple of years are the e-mails
18 that you've produced, correct?

19 MS. WOLFF: Objection.

20 A. That I'm personally aware of, yes.

21 Q. Okay. I'm going to put another
22 exhibit in front of you. We're going to mark
23 it as Exhibit 5. It's Newsweek 5.

24 (Exhibit 5 marked for
25 identification.)

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1 BY MR. BURROUGHS:

2 Q. Have you seen this image before?

3 A. Yes.

4 Q. Okay. Were you responsible for
5 providing this image to your attorney?

6 A. Yes.

7 Q. Okay. From where did you obtain
8 this image?

9 A. The website.

10 Q. Okay. Was this Elliot McGucken
11 photograph live at this URL when you went to
12 this website?

13 A. Yes.

14 Q. Okay. And do you recall when you
15 went to this website to make this screencap?

16 A. It would have likely been the same
17 day I became aware of the case.

18 Q. So that would have been back in the
19 summer to fall of 2019; is that correct?

20 A. Yes.

21 Q. Okay. And is this -- I know it's
22 small, but is this your personal avatar in the
23 upper right-hand corner there?

24 A. I can't see it. I'm not sure where
25 you're looking.

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1 MR. BURROUGHS: Thank you, Ms.
2 Zaharia.

3 BY MR. BURROUGHS:

4 Q. Is that you?

5 A. That's me.

6 Q. Okay. And we can back out.

7 So Newsweek does not dispute that it
8 published McGucken's photograph at this URL,
9 correct?

10 MS. WOLFF: Objection.

11 A. Yes. This is what I saw when I went
12 to this URL.

13 Q. Okay. And it was this McGucken
14 photograph that's in front of you in Exhibit 5,
15 correct?

16 A. Correct.

17 Q. Okay. And when you made this
18 screencap, did you first send it to Yuliya?

19 A. Yes.

20 Q. Okay. And it was at that time that
21 you had the back and forth regarding the
22 creation of this particular article, correct?

23 MS. WOLFF: Objection.

24 A. It's when we started corresponding
25 about it.

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1 Q. Okay. Let's look at Exhibit 6,
2 which is going to be Newsweek 23 through 27.

3 (Exhibit 6 marked for
4 identification.)

5 BY MR. BURROUGHS:

6 Q. Take a moment. Ms. Zaharia will
7 slowly scroll through these. I want to make
8 sure that you have a chance to read them.

9 (Pause in the Proceedings.)

10 Q. Okay. Have you had the opportunity
11 to review the e-mail?

12 A. To the best of my ability, yes.

13 Q. Okay. Do you recognize those as
14 e-mails to which you were a party?

15 A. I was not cc'd on all of these
16 e-mails, but I have seen them in the documents
17 that have been provided.

18 Q. The ones for which you're not cc'd,
19 do you know where those came from?

20 A. It would be like the one you're
21 looking at right here between Yuliya and the
22 writer directly.

23 Q. Okay. Aside from these e-mails, you
24 haven't had any e-mail contact with
25 Ms. Hignett, correct?

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1 A. Correct.

2 Q. Okay. And does the -- is it your
3 understanding that staff writers for Newsweek
4 could reach out to photographers and other
5 content creators using their personal Instagram
6 account in connection with official Newsweek
7 business?

8 A. Yes, that's something they can do.

9 Q. Okay. Does Newsweek have its own
10 account on Instagram?

11 A. Yes.

12 Q. Okay. Does the Newsweek team ever
13 use that team to reach out to content creators?

14 A. I don't manage the account, so I'm
15 not sure if that's something that they do.

16 Q. Okay. Do you know who manages the
17 account?

18 A. At the time that this happened,
19 would have been Adam's -- one of Adam Silvers'
20 subordinates.

21 Q. Do you know who that would have
22 been?

23 A. I don't know specifically. He
24 manages -- he had a team.

25 Q. Who was on that team that you

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1 recall?

2 A. I don't recall. Like I said, we've
3 got people in multiple offices so I don't
4 always know. But Adam Silvers would have been
5 the lead.

6 Q. And does this e-mail thread confirm
7 that Ms. Hignett did not receive a response
8 from Mr. McGucken providing any sort of consent
9 for use of his work?

10 A. I mean, that's subject to
11 interpretation, but based on what I interpret
12 from her e-mail, she said she did not receive a
13 response. And if you looked at his Instagram
14 page where her question was, there was no
15 response.

16 Q. Okay. So is there any way to
17 interpret that other than Mr. McGucken did not
18 respond to this request for consent?

19 A. That I'm aware of.

20 Q. Okay. And, in fact, to the extent
21 that Newsweek did use his work, it was done
22 without him granting consent?

23 A. As we've stated earlier, no
24 permission is required for embedding an image.
25 We only asked for permission to have the image

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1 hosted in our CMS and we did not do that.

2 Q. Okay. So when you say that We asked
3 for permission to have it hosted in our CMS,
4 where is that in Ms. Hignett's request?

5 A. If you go up to where -- it's in the
6 e-mail here. I don't know if that's the exact
7 wording she used.

8 Q. We can scroll up and she quotes her
9 message. Give us a moment. I just want you to
10 point out to me where it mentions CMS or
11 anything to that effect.

12 A. I mean, I'm using different jargon,
13 but that's what the request stated. That's how
14 I interpreted it.

15 Q. Understood. So what you're telling
16 me is your interpretation of her message to a
17 third-party, correct?

18 MS. WOLFF: Objection.

19 A. Yes. I believe she said "upload"
20 was the word.

21 Q. Okay. So is it your understanding
22 that, in fact, Ms. Hignett asked for consent to
23 upload the photograph on the Newsweek website?

24 A. Yes.

25 Q. And also based on your review of

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1 Newsweek's records, there was never any consent
2 or there was never any advisement to Mr.
3 McGucken that the embed process or CMS process
4 was going to be used?

5 MS. WOLFF: Objection.

6 A. I mean, you can see what her
7 question is. That's what was requested.

8 Q. Okay. Did Newsweek separately
9 contact Mr. McGucken to either: A) request
10 some other type of consent; or B) advise him
11 that they're going to be displaying his
12 photography on their website?

13 MS. WOLFF: Objection.

14 A. Not that I'm aware. You see the
15 question that she's presented to him.

16 Q. Is it Newsweek's practice to advise
17 artists and photographers that Newsweek plans
18 to display their photography on their website
19 before doing so?

20 MS. WOLFF: Objection.

21 A. There's different forms of display.

22 Q. Okay. So is that the practice?

23 MS. WOLFF: Objection.

24 A. We always request permission to
25 upload an image to our website. We do not

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1 always request permission to embed a link to
2 somebody else's Web page.

3 Q. Okay. Do you ever advise the artist
4 that you're going to be displaying their work
5 on your site before you do so?

6 MS. WOLFF: Objection.

7 A. As I've stated earlier, we request
8 permission to upload images to our website. We
9 do not always request permission to include an
10 embedded link.

11 Q. Do you want me to ask the question
12 again?

13 A. I feel like I've answered it.

14 Q. Well, maybe we're getting caught up
15 on the language. We talked a little bit about
16 consent and you conceded, look, we did not have
17 any consent from him. Fine. Now I'm asking
18 about notice.

19 So is it Newsweek's practice to
20 provide notice to these artists? Not seek
21 consent, but to give them notice that Newsweek
22 plans to exploit their photography on their
23 website?

24 MS. WOLFF: Objection.

25 A. We request permission to use images.

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1 We wouldn't request permission and say, Hey,
2 we're also going to -- I think we're talking
3 about two different things, but we don't use
4 images without permission when it's necessary.

5 Q. Sure. And now I'm asking about
6 notice. Okay? So my question is: Is it
7 Newsweek's practice to provide notice to tell
8 the artist that Newsweek intends to display the
9 artist's photography on its website before
10 doing so?

11 MS. WOLFF: Objection.

12 A. As I've stated, we do not need to
13 give notice for an embed, so we wouldn't
14 provide notice for an embed.

15 Q. Okay. Fair enough. So it's News --

16 A. And we do not use an image uploaded
17 to our CMS without permission. So no notice
18 would be made because we wouldn't do it without
19 permission.

20 Q. Okay. So is it fair to say or is it
21 accurate to say that it's Newsweek's business
22 practice, when using an embed, to exploit
23 photography without the photographer's consent
24 or without giving notice to the photographer?

25 MS. WOLFF: Objection.

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1 A. We follow Instagram's guidelines,
2 which don't exploit. If you --

3 Q. I understand --

4 A. Sorry. Go ahead.

5 Q. I understand the statement that
6 you're giving, but it's just simply not
7 responsive to the question. So let me ask the
8 question one more time, and please listen to
9 the question and try to answer the question.
10 Okay?

11 Is it accurate to state that it's
12 Newsweek's business practice to display on its
13 website photography via embeds without the
14 consent of the photographer and without giving
15 prior notice to the photographer?

16 MS. WOLFF: Objection.

17 A. Correct.

18 Q. Thank you. Now, when looking at the
19 article at issue, did you see advertisements
20 surrounding Mr. McGucken's photograph?

21 A. I gave a full screenshot to what was
22 visible to me and I showed the whole page.

23 Q. Okay. Do you recall seeing
24 advertisements?

25 A. I don't recall.

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1 Q. Okay. Does Newsweek run
2 advertisements on its website?

3 A. Yes.

4 Q. Is Newsweek paid for those
5 advertisements?

6 A. I'm not involved with the
7 advertising side of the business, but I would
8 assume that they are paid.

9 Q. Okay. And per your guidelines, does
10 the fact whether or not there are
11 advertisements along with the photography
12 that's being used from a third-party site via
13 embed, does that impact your decision whether
14 or not to either get the consent of the
15 photographer or give notice to the
16 photographer?

17 A. The journalistic organization ads
18 don't impact our stories in the way we write
19 them.

20 Q. So I, and correct me if I'm wrong, I
21 don't want to put words in your mouth, so
22 you're telling me it doesn't matter whether or
23 not there's advertising alongside their work or
24 not, correct?

25 A. Editorial content is editorial

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1 content.

2 Q. Okay. So as far as the content of
3 the piece goes, it's immaterial to you whether
4 or not there is advertising or not on the page
5 with the content, correct?

6 A. Correct.

7 Q. All right. We're going to look at
8 Exhibit 7, which is Newsweek 3.

9 (Exhibit 7 marked for
10 identification.)

11 BY MR. BURROUGHS:

12 Q. Just tell me if you recognize these
13 e-mails?

14 A. This is familiar, yes.

15 Q. And you see the date there,
16 January 24, 2021. Do you see that?

17 A. Yes.

18 Q. And below that January 21, 2020. Do
19 you see that?

20 A. Yes.

21 Q. Okay. And it indicates that on
22 January 21, 2020, Ms. Rice is working on
23 removing the, quote/unquote, image. Do you
24 know what image she's referring to there?

25 A. It would have been referring to the

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1 embed.

2 Q. Would that be the embed of
3 Mr. McGucken's photograph?

4 A. Most likely, yes.

5 Q. Okay. So is it fair to say that
6 Newsweek removed Mr. McGucken's photograph from
7 Newsweek's website no earlier than January 21,
8 2020?

9 A. Yes.

10 MR. BURROUGHS: All right. Ms.
11 Zaharia, what exhibit was this? Okay. So mark
12 this as Exhibit 7?

13 BY MR. BURROUGHS:

14 Q. And I'm next going to direct your
15 attention to Exhibit 8, which is going to be
16 Newsweek 23 to 27.

17 Oh, I apologize. We've actually
18 already marked this as Exhibit 26 -- I'm sorry,
19 it's Exhibit 6, I believe. Is that correct,
20 Ms. Zaharia? Okay.

21 So there is an indication -- we have
22 to scroll through it; this is one of the
23 difficulties of Zoom depositions -- that this
24 article may have been pitched by a Newsweek
25 editor. Do you see that in the e-mail?

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1 (Pause in the proceedings.)

2 Q. Do you see that language?

3 A. Yes.

4 Q. Do you know whether or not it was
5 pitched by an editor, this particular article?

6 A. I can't -- I don't know.

7 Q. Okay. Do you know who her editor
8 was at the time?

9 A. James would probably know; I don't.

10 Q. Now, we're going to direct your
11 attention to the real Exhibit 8, which is
12 Newsweek 28.

13 (Exhibit 8 marked for
14 identification.)

15 BY MR. BURROUGHS:

16 Q. Do you recognize this screen?

17 A. I've seen it.

18 Q. When did you first see this screen?

19 A. Maybe a couple of weeks ago.

20 Q. Okay. In what context did you see
21 this screen?

22 A. Yuliya provided it to me.

23 Q. Okay. So is it your understanding
24 that this is the message sent by Newsweek to
25 Mr. McGucken requesting consent?

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1 A. To my knowledge, yes.

2 Q. Okay. And to your knowledge, this
3 is the only message that was sent by Newsweek
4 to Mr. McGucken, correct?

5 A. That I'm aware of.

6 Q. Okay. Okay. So looking back at
7 Exhibit 4 real briefly, that's, I believe, the
8 screenshot of the McGucken publication at issue
9 or article at issue.

10 (Pause in the Proceedings.)

11 Q. Okay. So have you reviewed the
12 entire article, the text, and everything else
13 for this particular item?

14 A. I've read the story.

15 Q. You read it. Okay. Now, in your
16 words, what is the story about?

17 A. The story is about this specific
18 lake that was created and it also references
19 the photographer's experience on it.

20 Q. Okay. Is the story about the
21 photograph?

22 MS. WOLFF: Objection.

23 A. The story is about the formation of
24 this lake.

25 Q. Okay. So it's fair to say that the

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1 story is not about the photograph, correct?

2 MS. WOLFF: Objection.

3 A. The image illustrates the lake that
4 the story is about.

5 Q. Okay. So is it accurate to say that
6 the story is not itself about the photograph?

7 MS. WOLFF: Objection.

8 A. I don't know the thought process in
9 the creation of this story, so I don't know
10 what started the piece. But the story is about
11 this specific lake and I think at least two
12 paragraphs worth of the story is about the
13 photographer's experience of this lake.

14 Q. Okay. Does the story comment at all
15 on the photograph?

16 MS. WOLFF: Objection.

17 A. I believe it does or at least
18 photographs in plural.

19 Q. How does it do that?

20 A. I mean, you'd need to go to the
21 story. I could point to it specifically where
22 it says that.

23 Q. Okay. Did Newsweek add anything to
24 the photograph?

25 MS. WOLFF: Objection.

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1 BY MR. BURROUGHS:

2 Q. Before publishing it here?

3 A. We didn't manipulate the photograph.

4 Q. Okay. Do you know how long it took
5 Ms. Hignett to write this particular item?

6 A. I'm not aware of the length of time
7 it took her to produce this story.

8 Q. Okay. And you're not aware of any
9 of the other specifics relating to the actual
10 creation of this article, correct?

11 A. I'm not.

12 MS. WOLFF: Objection.

13 BY MR. BURROUGHS:

14 Q. Okay. Now, you said earlier that
15 you felt that you could use any photographer's
16 work without their consent so long as it was
17 newsworthy?

18 MS. WOLFF: Objection.

19 BY MR. BURROUGHS:

20 Q. In what circumstances would you
21 decide, as the photo editor for the magazine or
22 for the website, that something is newsworthy?

23 A. I mean, it's an event that happens.
24 In relation to this specific, it's a weather
25 event. I would consider a weather event

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1 newsworthy.

2 Q. Okay. So in your estimation,
3 weather is newsworthy?

4 A. Yes.

5 Q. Okay. And why is that?

6 MS. WOLFF: Objection.

7 A. Because --

8 MS. WOLFF: You can answer.

9 A. I mean, if it affects people.

10 Q. Okay. So it sounds to me like
11 you're saying anytime a story affects people,
12 it's newsworthy enough to use an artist's work
13 without consent. Is that accurate?

14 MS. WOLFF: Objection.

15 A. I think you're putting words in my
16 mouth.

17 Q. Oh, please can you explain to me a
18 little bit more about why you think that this
19 particular photograph is newsworthy?

20 A. It's an unusual occurrence.

21 Q. Okay. Anything else? From where
22 did you learn your definition of the phrase
23 "newsworthy" as you're using it today?

24 MS. WOLFF: Objection.

25 A. I couldn't say exactly. I've been

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1 in the industry a long time.

2 Q. Okay. Let's say hypothetically
3 that, you know, I was in the news because I won
4 a Grammy award. In such a circumstance, do you
5 feel that using a photograph of me would be
6 newsworthy?

7 MS. WOLFF: Objection.

8 A. Yes.

9 Q. Okay. And is it fair to say that
10 you're using or Newsweek is -- let me withdraw
11 the question.

12 Is Newsweek using McGucken's
13 photograph to illustrate this story about the
14 weather in Death Valley?

15 MS. WOLFF: Objection.

16 A. I mean, it's included as part of the
17 story to illustrate what was seen.

18 Q. Okay. For what other purposes is it
19 being included, if any?

20 A. It's informative.

21 Q. Okay. In what sense?

22 A. It shows the lake that was described
23 in the story.

24 Q. Okay. So is it fair to say that the
25 sole reason to use McGucken's photograph is to

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1 illustrate what's being talked about in the
2 story?

3 MS. WOLFF: Objection.

4 A. I can't speak to the writer's
5 thought process, but I believe she used it
6 because it related to the piece.

7 Q. Okay. Any other reason?

8 A. No, not that I can think of.

9 Q. Okay. Now, assuming that you didn't
10 embed this photograph here and we're looking
11 for a picture of Death Valley to illustrate the
12 piece, would you obtain one from Getty under
13 your paid subscription?

14 A. That would be the proper means, the
15 first means that we would have used.

16 Q. Okay. And if you were obtaining it
17 from a third-party photographer, would you make
18 some sort of license payment to them?

19 MS. WOLFF: Objection.

20 A. Unlikely. We would have asked
21 permission. If they said no, we just would
22 have moved on.

23 Q. Okay. So in certain circumstances
24 when the artist tells you no or doesn't give
25 you consent, you'll move on and not use the

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1 work?

2 MS. WOLFF: Objection.

3 A. That was in reference to uploading
4 an image to our CMS.

5 Q. Okay. Well, let's say that you
6 weren't able to copy Mr. McGucken's work and
7 had to reach out to another source, another
8 photographer --

9 MS. WOLFF: Objection.

10 Q. -- for a photograph to illustrate
11 this story, would you typically pay for such a
12 license?

13 MS. WOLFF: Objection.

14 A. No.

15 Q. Okay. Has Newsweek ever, other than
16 the one instance you told me earlier, ever paid
17 a third-party photographer for the use of their
18 work during your tenure?

19 MS. WOLFF: Objection.

20 A. Yes.

21 Q. Okay. And other than the one you've
22 already told me about, when is the last time
23 that happened?

24 A. It doesn't happen very frequently.

25 Q. Okay. But in certain circumstances,

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1 if Newsweek wants to publish a photograph to
2 illustrate one of its stories, it will pay the
3 creator and/or owner a license fee to use it,
4 correct?

5 A. Only under very specific
6 circumstances. It's not something we typically
7 do. If we can't get an image from a
8 photographer, we just won't use it or possibly
9 not publish the story.

10 Q. Okay. So is it fair to say that
11 Newsweek's business practice in terms of visual
12 assets and publishing photography is to rely on
13 its Getty subscription and rely on obtaining
14 free photographs from creators?

15 MS. WOLFF: Objection.

16 A. That's our -- typically what we do.

17 Q. Okay. Now, does Newsweek claim to
18 own the copyright for the articles posted on
19 its site?

20 MS. WOLFF: Objection.

21 A. The words, yes.

22 Q. Okay. Does Newsweek claim to own
23 the copyright on the photographs it posts on
24 its site?

25 A. We license the photographs from

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1 Getty in most cases, so they license it to us.

2 Q. Okay. In your experience over the
3 years as the photo director at Newsweek, has
4 Newsweek ever claimed to own the copyright for
5 the photographs on its website?

6 MS. WOLFF: Objection.

7 A. There's maybe a handful of places
8 where we might, but for the most part, we
9 consider things one-time use specific to the
10 story it was originally created for.

11 Q. So if you were to learn that
12 Newsweek was claiming to own copyright in the
13 photographs on its website, that would be a
14 surprise to you and it would be a false
15 statement to copyright ownership, correct?

16 MS. WOLFF: Objection.

17 A. I'm not aware of such a statement.

18 Q. Okay. We're going to put in front
19 of you Exhibit 9, which there's no Bates stamp,
20 but I believe it's the Newsweek's terms and
21 conditions.

22 (Exhibit 9 marked for
23 identification.)

24 BY MR. BURROUGHS:

25 Q. Have you ever reviewed these before?

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1 A. I don't believe so.

2 Q. Okay. We can pull that exhibit
3 down.

4 So as you sit here today, and maybe
5 this makes sense given that you're not involved
6 with the website to a great degree, you've
7 never reviewed the website's terms and
8 conditions, correct?

9 A. Not the ones that you presented to
10 me.

11 Q. Okay. Do you recall reviewing other
12 terms and conditions?

13 A. I do not recall.

14 Q. Okay. Okay. Let's go off the
15 record for five minutes. We're probably just
16 about done.

17 (At this point in the proceeding, a
18 brief recess is taken.)

19 BY MR. BURROUGHS:

20 Q. Let's go back on the record. You
21 understand you're still under oath?

22 A. Yes.

23 Q. Okay. So looking again at
24 Exhibit 4, the McGucken article at issue as
25 posted on Newsweek.com.

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1 Okay. When Newsweek distributed this
2 article to its viewers, did it distribute the
3 entirety of the McGucken photograph?

4 MS. WOLFF: Objection.

5 A. I'm not sure what you mean. Like if
6 it was visible on Facebook, the only thing you
7 would see would actually be the Getty image and
8 then you wouldn't see the full story until you
9 click on it.

10 Q. Okay. So when Newsweek distributed
11 this particular article, the one that
12 incorporates the McGucken photograph to
13 viewers, the viewers would see the entirety of
14 the McGucken photograph. Is that accurate?

15 MS. WOLFF: Objection.

16 A. If they clicked on the story, they
17 would see it.

18 Q. Okay. And the version they would
19 see, would that be modified or altered at all?

20 MS. WOLFF: Objection.

21 A. Not that I'm aware of.

22 Q. Okay. Would it appear to the viewer
23 of the Newsweek site exactly as it appears on
24 Mr. McGucken's Instagram?

25 A. It would.

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1 Q. Okay. And looking at the
2 photograph, you know, as someone with
3 experience in the industry, does this strike
4 you as a creative photograph?

5 MS. WOLFF: Objection.

6 A. It's subjective. It could be
7 creative or it could be editorial depending on
8 its use.

9 Q. Okay. Based on your experience
10 looking at the work in front of you, would you
11 consider this to be a creative photograph?

12 MS. WOLFF: Objection.

13 A. I'd say it could be either.

14 Q. Would you lean one way or the other?

15 A. I'd say it's editorial. It's
16 showing a moment in time.

17 Q. Okay. Do you believe that the
18 photograph reflects any artistic choices?

19 MS. WOLFF: Objection.

20 A. It does look like there's a bit of a
21 filter on it.

22 Q. Anything else?

23 A. I mean, when anyone takes an image,
24 they are deciding on composition.

25 Q. Okay. Anything else?

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1 A. No.

2 Q. Okay. And how do you define
3 editorial?

4 A. It's a news event.

5 Q. Would you agree that this photograph
6 is entirely different in terms of creativity
7 from a photograph, let's say, shot by a
8 paparazzi of a sports player?

9 MS. WOLFF: Objection.

10 A. I mean, that's apples and oranges.
11 They're different.

12 Q. And why are they different?

13 A. One's a -- sports fall under a
14 different category typically for photography.

15 Q. And can you explain a little bit
16 more to me why is that different?

17 A. It's a different type of
18 photographer, typically.

19 Q. Okay. Anything else?

20 A. No.

21 Q. Okay. Would you say based on your
22 experience that the photograph you see in front
23 of you by Mr. McGucken is more creative than a
24 paparazzi photograph of a professional athlete?

25 MS. WOLFF: Objection.

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1 A. They're different. It's apples and
2 oranges. One is a sporting event.

3 Q. Is one more creative than the other
4 in your mind?

5 MS. WOLFF: Objection.

6 A. It's very subjective. I think a
7 sporting event can be very creative.

8 Q. So is it Newsweek's position that
9 paparazzi photographs of athletes are more
10 creative than the type of photograph we see in
11 front of us here in the exhibit?

12 MS. WOLFF: Objection.

13 A. When you say "paparazzi," you're
14 thinking about a street photographer taking
15 pictures of a random individual versus an
16 actual event where someone is playing a sport.
17 I think you need to clarify what you mean. I'm
18 not really sure what you're getting at.

19 Q. I think you have the distinction --
20 you seem to have stated it perfectly. A
21 photograph of an athlete walking down the
22 street, let's say. Will that type of
23 photograph be more creative than the photograph
24 in front of you?

25 A. It depends on the photographer, I

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1 suppose.

2 Q. Okay. Do you know why Newsweek
3 chose to publish Mr. McGucken's photograph as
4 part of this article as opposed to some other
5 photograph of Death Valley?

6 A. I believe because they wanted to
7 write about this specific photographer's
8 experience in seeing this lake.

9 Q. And what's that knowledge based
10 upon?

11 A. I mean, you asked me to assume what
12 was thought. That's all I can tell you.

13 Q. Okay. So your testimony about why
14 they chose this photograph is a guess or
15 speculation, correct?

16 MS. WOLFF: Objection.

17 A. I wasn't involved with the creation
18 of the story.

19 Q. And as you sit here today, you have
20 no understanding or no knowledge as to why this
21 particular photograph was chosen to be
22 published as part of this story, correct?

23 MS. WOLFF: Objection.

24 A. I believe it was chosen because they
25 wanted to write about this specific instance,

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1 this specific photographer's experience.

2 Q. But that belief is based on your
3 speculation, correct?

4 MS. WOLFF: Objection.

5 A. There's also a reference to the
6 story, I believe, in one of the e-mails.

7 Q. Okay. What reference are you
8 referring to?

9 A. There's a reference to this
10 photographer experiencing this lake. There's a
11 story that was referenced in there.

12 Q. Okay. Is there any other basis for
13 your testimony?

14 A. No.

15 Q. Okay. Let's look at -- well, strike
16 that.

17 Earlier you testified, and I don't
18 want to put words in your mouth, but I believe
19 you testified that Newsweek has never violated
20 any of Instagram's terms. Do you stand by that
21 testimony?

22 MS. WOLFF: Objection.

23 A. To my knowledge.

24 Q. Okay. I'm going to put a document
25 in front of you, Exhibit 10. It's Newsweek

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1 157, I believe.

2 (Exhibit 10 marked for
3 identification.)

4 BY MR. BURROUGHS:

5 Q. And Ms. Zaharia will scroll through
6 it, but can you tell me if you've ever seen
7 this before?

8 A. Yes.

9 Q. Okay. When was the first you recall
10 reading this particular document?

11 A. I would say about a week ago.

12 Q. Okay. And when you read it, were
13 you at home or were you somewhere else?

14 A. I was at home.

15 Q. Okay. And do you have any
16 understanding of these terms other than what
17 you gleaned from your review that took place
18 recently?

19 MS. WOLFF: Objection.

20 A. Can you rephrase the question?

21 Q. Sure. So you testified that you
22 reviewed these terms recently, correct?

23 A. Uh-huh.

24 Q. Had you reviewed them in the past or
25 conferred with anyone regarding their contents?

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1 A. This specific document?

2 Q. Correct.

3 A. I haven't since I read this one last
4 week.

5 Q. What about before that?

6 A. As I stated, this particular
7 document I saw about a week ago. I've seen
8 other terms of service for Instagram.

9 Q. Okay. All right. Let's take a look
10 at paragraph A-11. Okay. Well, let me ask
11 you, what's your understanding of this -- these
12 terms or this document?

13 A. It's my understanding that you can
14 embed images and the only time you need
15 permission is if it's commercial use.

16 Q. Okay. Do you understand that these
17 are the terms that one has to comply with if
18 they want to embed content from Instagram?

19 A. Yes.

20 Q. Okay. So take a look at paragraph
21 11. I'll read it to you.

22 It says, "Comply with any requirements
23 or restrictions imposed on usage of Instagram
24 user photos and videos ("User Content") by
25 their respective owners. You are solely

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1 responsible for making use of User Content in
2 compliance with owners' requirements or
3 restrictions?"

4 Do you see that?

5 A. Yes.

6 Q. Okay. In connection with Newsweek's
7 use of McGucken's photography, did Newsweek
8 comply with paragraph 11 of this policy?

9 A. As far as I'm aware, there were no
10 terms of compliance written on his site, so I'm
11 not sure what that would be referencing to.

12 Q. Did Newsweek comply with paragraph
13 11 when publishing McGucken's content?

14 MS. WOLFF: Objection.

15 A. As far as I'm aware.

16 Q. Okay. What steps did Newsweek take
17 to ensure that they complied with paragraph 11?

18 A. I'm not sure what steps could be
19 taken.

20 Q. Okay. Well, per paragraph 11, were
21 you aware that Newsweek was, quote, solely
22 responsible for making use of user content in
23 compliance with owners' requirements or
24 restrictions?

25 A. Yes, but I'm not sure what

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1 restrictions -- it's a pretty vague statement.

2 Q. What's your understanding of it?

3 A. I mean, if the owner has
4 requirements that they state to us, we follow
5 them.

6 Q. So it's Newsweek's position that all
7 paragraph 11 requires is that for Newsweek to
8 comply with restrictions that are affirmatively
9 provided to Newsweek?

10 MS. WOLFF: Objection.

11 A. I'm not sure where else that
12 information would come from.

13 Q. So is that Newsweek's position?

14 MS. WOLFF: Objection.

15 A. You asked my interpretation of it.
16 I'm trying to provide my interpretation of it.

17 Q. Remember, as discussed at the
18 outset, you are testifying on behalf of
19 Newsweek.

20 MS. WOLFF: Objection.

21 BY MR. BURROUGHS:

22 Q. So I'm looking for how Newsweek
23 interprets this. I think you're telling me,
24 and I don't want to put words in your mouth,
25 you're telling me that Newsweek doesn't have to

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1 comply with paragraph 11 unless the artist
2 somehow reached out to them with restrictions.
3 Is that what you're saying?

4 MS. WOLFF: Objection. The document
5 speaks for itself.

6 BY MR. BURROUGHS:

7 Q. Is that what you're saying?

8 A. I think you're putting words in my
9 mouth. I don't really have a response to this.

10 Q. Okay. What steps did Newsweek do to
11 comply with McGucken's requirements and
12 restrictions in connection with the use of the
13 McGucken photograph at issue?

14 MS. WOLFF: Objection.

15 A. Unless there's something written in
16 his site about his requirements and rules on
17 the Instagram page, I'm not -- I don't know
18 where -- there was no information provided by
19 the photographer there.

20 Q. Okay. So is it fair to say that
21 it's Newsweek's position that unless the
22 Instagram account has some sort of restrictions
23 written on the account, Newsweek does not need
24 to take any further steps to ensure they are,
25 quote, in compliance with the owners'

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1 requirements or restrictions, unquote?

2 MS. WOLFF: Objection.

3 A. Yes.

4 MR. BURROUGHS: Did you get the
5 answer, Madam Court Reporter?

6 THE REPORTER: Yes.

7 MR. BURROUGHS: Correct. Okay.

8 BY MR. BURROUGHS:

9 Q. And as you sit here today, you don't
10 recall, other than the message sent by Ms.
11 Hignett, Newsweek doing anything to ensure it
12 was in compliance with McGucken's requirements
13 or restrictions relating to the photograph at
14 issue, correct?

15 MS. WOLFF: Objection.

16 A. Correct.

17 Q. Okay. Now let's take a look at
18 paragraph 13 and I'll read it.

19 It says you must, "Obtain a person's
20 consent before including their User Content in
21 any ad."

22 Do you see that?

23 A. Yes.

24 Q. What do you take that to mean?

25 A. That means you need permission for

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1 an ad, but it also implies that since it says
2 you need permission for an ad, it would state
3 that you would need it for editorial, if it was
4 required for editorial.

5 Q. Okay. Do you recall advertising
6 being incorporated with the subject photograph
7 on the Newsweek page at issue?

8 MS. WOLFF: Objection.

9 A. There may have been ads on the page,
10 but that doesn't mean a visual was incorporated
11 in the ad.

12 Q. Okay.

13 A. It specifically says in an ad.

14 Q. Okay. Let's take a look at
15 paragraph 16. Well, let me ask you one more
16 time. On 13, do you believe Newsweek complied
17 with that paragraph --

18 A. Yes.

19 Q. -- in using Mr. McGucken's work?

20 A. Yes.

21 Q. Okay. 16 says, "Don't use the
22 Instagram Platform to simply display User
23 Content, import or backup content, or manage
24 Instagram relationships, without our prior
25 permission."

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1 Do you see that?

2 A. Yes.

3 Q. Did Newsweek use the Instagram
4 platform simply to display Mr. McGucken's
5 content on its website?

6 MS. WOLFF: Objection.

7 A. No. It used it to illustrate the
8 concept in the story. It was not random.

9 Q. Okay. Do you believe that the
10 McGucken photograph was displayed on the
11 Newsweek website?

12 MS. WOLFF: Objection.

13 A. It was visible on the website by an
14 Instagram link.

15 Q. Okay. And I believe your definition
16 of "display" is to make something visible,
17 correct?

18 A. That's a broad definition of it,
19 yes.

20 Q. Okay. Was that your definition?

21 A. I would say that's accurate.

22 Q. Okay. Did you obtain Instagram's
23 prior permission before displaying McGucken's
24 content on Newsweek?

25 MS. WOLFF: Objection.

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1 A. I don't see where that's required.

2 Q. Okay. So your read of paragraph 16
3 is that no such permission is required,
4 correct?

5 MS. WOLFF: Objection.

6 BY MR. BURROUGHS:

7 Q. Take a look -- well, is that
8 correct?

9 A. It says that without permission if
10 you wanted to simply display random content.
11 We didn't display random content.

12 Q. I don't believe it says random
13 content. I believe it says user content.
14 Isn't that correct?

15 A. That is correct.

16 Q. And isn't your understanding that
17 Mr. McGucken's photograph as published on your
18 website is user content?

19 MS. WOLFF: Objection.

20 A. It would simply be defined as user
21 content.

22 Q. I'm sorry, I wasn't able to hear
23 that. Can you repeat the answer?

24 A. Yes.

25 Q. Okay. So we're in agreement that

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1 Mr. McGucken's photograph, as published on your
2 website, fits within the user content
3 definition in paragraph 16, correct?

4 MS. WOLFF: Objection.

5 A. I don't know if there's an earlier
6 definition for user content in the site, but
7 images posted to Instagram, I believe, this is
8 referring to as user content.

9 Q. Okay. And we're in agreement that
10 Newsweek displayed that user content in the
11 form of the McGucken photograph, correct?

12 MS. WOLFF: Objection.

13 A. I believe I've answered this
14 question multiple times.

15 Q. Okay. So, correct?

16 A. The image was visible on our
17 website, yes, via an Instagram link.

18 Q. Okay. And before displaying Mr.
19 McGucken's user content on Newsweek.com, you
20 did not obtain the prior permission of
21 Instagram, correct?

22 MS. WOLFF: Objection.

23 A. I'm not sure how that's relevant.

24 Q. Did you obtain the permission or
25 not?

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1 MS. WOLFF: Objection.

2 A. We did not communicate with
3 Instagram regarding this image.

4 Q. Okay. Have you ever had -- has --
5 withdraw the question.

6 Has Newsweek had any communications
7 with Instagram or Facebook relating to this
8 image?

9 A. Not to my knowledge.

10 Q. Has Newsweek had any communications
11 with Instagram or Facebook relating to the
12 publication of user content from those
13 platforms?

14 A. Not that I'm aware of it.

15 Q. Okay. So it sounds like we're in
16 agreement that there was no outreach by
17 Newsweek to Instagram in connection with the
18 McGucken photograph that would in any way
19 relate to paragraph 16, correct?

20 MS. WOLFF: Objection.

21 BY MR. BURROUGHS:

22 Q. Is that correct?

23 A. I'm sorry, I didn't realize that was
24 a question.

25 Q. Looking at paragraph 16, it's

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1 accurate to say that Newsweek at no point has
2 reached out to Instagram or Facebook to obtain
3 any permission to publish or display content
4 from those platforms?

5 MS. WOLFF: Objection.

6 A. We did not communicate with
7 Instagram regarding this particular case.

8 Q. And Facebook --

9 A. That I'm aware of. That I'm aware
10 of.

11 Q. Understood. So Newsweek is not
12 aware of any such communications with
13 Instagram. How about Facebook?

14 A. Not that I'm aware of.

15 Q. Okay. Let's look at paragraph 35.
16 Okay. I'm going to read you this section.

17 It says, quote: Comply with all
18 applicable laws or regulations. Don't provide
19 or promote content that violates any rights of
20 any person, including but not limited to
21 intellectual property rights, rights of
22 privacy, or rights of personality. Don't
23 expose Instagram or people who use Instagram to
24 harm or legal liability.

25 Do you see that?

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1 A. Yes.

2 Q. Okay. Do you believe that Newsweek
3 is in compliance with that?

4 MS. WOLFF: Objection.

5 A. Yes.

6 Q. Do you believe that Newsweek's
7 publication of McGucken's photograph violated
8 any intellectual property rights?

9 MS. WOLFF: Objection.

10 A. I believe that's what is trying to
11 be decided here. So if there's no outcome,
12 then I don't have a response.

13 Q. Okay. So you have no position as to
14 whether or not the use violated intellectual
15 property rights as we sit here today?

16 MS. WOLFF: Objection.

17 A. We're under the impression we
18 followed the terms of service, so no.

19 Q. Okay. Let's look down at D-8. I'll
20 read to you the relevant section.

21 It says, "Please note that User
22 Content is owned by users and not by
23 Instagram."

24 Do you see that?

25 A. Yes.

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1 Q. And "All rights not expressly
2 granted to you are reserved by Instagram."

3 Do you see that?

4 A. Yes.

5 Q. Okay. So do you believe after
6 reviewing that language that Instagram gave you
7 the right to display McGucken's photograph?

8 MS. WOLFF: Objection.

9 A. It's industry-wide belief that, yes.

10 Q. Other than the, quote, industry-wide
11 belief, is there any other basis for that
12 answer?

13 MS. WOLFF: Objection.

14 A. It's our interpretation that we did.

15 Q. Okay. Has anyone at Instagram or
16 Facebook ever communicated with Newsweek to
17 confirm that Newsweek can use any content on
18 Facebook or Instagram?

19 MS. WOLFF: Objection.

20 A. Not to my knowledge.

21 Q. Okay. Let's take a look at
22 paragraph 9.

23 It says, "You represent and warrant
24 that you own or have secured all rights
25 necessary to display, distribute and deliver

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1 all content in your app or website."

2 Do you see that?

3 A. Yes.

4 Q. What steps, if any, did Newsweek
5 take to secure the rights in the McGucken
6 photograph before using the content on its
7 website?

8 MS. WOLFF: Objection.

9 A. It's my interpretation that's in
10 reference to what you're putting on your own
11 site, as in your own images, that you're not
12 violating your own copyright.

13 Q. And what's that understanding based
14 on?

15 A. How I interpret what I'm seeing
16 here.

17 Q. Okay. At the time you wrote your
18 social media guidelines for Newsweek, did you
19 consult these terms?

20 A. Not these specific terms, but I have
21 read other terms for Instagram.

22 Q. Okay. At the time you wrote the
23 social media guidelines, did you review any
24 Instagram terms?

25 A. I likely did.

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1 Q. Do you recall doing so?

2 A. I don't recall offhand.

3 Q. Do you recall why you chose not to
4 indicate in your social media guidelines any of
5 the requirements of Instagram?

6 MS. WOLFF: Objection.

7 A. Because we only felt that writing
8 about the embeds were -- sorry, the Instagram
9 uploads to our CMS system was what needed to be
10 covered.

11 Q. Okay. Take a look at paragraph
12 11 -- I'm sorry, 13.

13 I'll read you the relevant language
14 that "You are responsible for obtaining the
15 necessary rights from all applicable rights
16 holders to grant this license."

17 Do you see that?

18 A. I'm sorry, point at it, please.

19 Q. There it is.

20 A. Again, I believe that's in reference
21 to content that's being uploaded.

22 Q. Okay. Did Newsweek take any steps
23 to obtain the necessary rights from McGucken
24 per this paragraph?

25 MS. WOLFF: Objection.

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1 A. This is in reference to content
2 that's being uploaded to Instagram, not
3 embedding from Instagram.

4 Q. Okay. So it's fair to say that
5 Newsweek didn't reach out to McGucken for any
6 reason in connection with this paragraph,
7 right?

8 MS. WOLFF: Objection.

9 A. I believe we covered that in our
10 correspondence.

11 Q. Okay. And Newsweek doesn't claim
12 that Instagram or Facebook gave them a
13 sublicense to use McGucken's work, correct?

14 MS. WOLFF: Objection.

15 A. I mean, that's interpretive
16 according to these terms of service. It's
17 believed that we had permission to do so via
18 Instagram.

19 Q. And are you basing that entirely on
20 these terms of service?

21 MS. WOLFF: Objection.

22 A. That and the industry, I believe,
23 and the interpretation of these terms of
24 service.

25 Q. Any other basis?

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1 A. No.

2 Q. Okay. Did Instagram or Facebook
3 ever advise you specifically that you had the
4 right to publish Mr. McGucken's content on your
5 website?

6 MS. WOLFF: Objection.

7 A. As I've stated before, we have not
8 communicated directly with the platform.

9 Q. Okay. Has the platform communicated
10 with you in any way to indicate to you that
11 they grant to you a sublicense to use
12 McGucken's work on your website?

13 MS. WOLFF: Objection.

14 A. We haven't specifically spoken with
15 the platform.

16 Q. Okay. Give me one moment to go over
17 my notes here. I think we're just about done.

18 One more question. Does Newsweek keep
19 copies of its archived posts?

20 A. Define what you mean by posts.

21 Q. Articles.

22 A. I mean, stories stay on the website;
23 they don't come down.

24 Q. Okay. To the extent that --
25 withdrawn.

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1 Earlier you testified that you believe
2 that the McGucken article at issue is still
3 online but with a different photograph,
4 correct?

5 A. The story remained up, but the
6 Instagram embed was removed.

7 Q. Okay. And it's your understanding
8 that the embed was not replaced, right?

9 A. The embed was not replaced.

10 Q. Okay. Is -- does Newsweek maintain
11 a copy of that article with the McGucken
12 photograph in place?

13 A. No.

14 MR. BURROUGHS: Okay. All right, I
15 have no further questions. We can relieve the
16 court reporter of her duties at this time. We
17 can go off the record.

18 MS. WOLFF: Can we just have a
19 moment? Can we just have a moment to see if
20 there's anything we would like to ask?

21 MR. BURROUGHS: Oh, sure.

22 MS. WOLFF: Thank you. I just want
23 to go over my notes for a minute. Okay?

24 (Pause in the Proceedings.)

25 MS. WOLFF: Okay. Can you see the

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1 screen? We just have a follow-up question
2 about one document. And I think Sara is going
3 to do it because she's more proficient with
4 Zoom here.

5 MS. GATES: Well, we'd like to share
6 an exhibit. Do you have a preference for
7 whether we would designate this as Exhibit 11
8 or start a new naming convention?

9 MR. BURROUGHS: A new Exhibit 11 is
10 fine.

11 MS. GATES: Okay.

12

13 EXAMINATION

14 BY MS. GATES:

15 Q. Okay. So I'm sharing a document on
16 my screen here. This is Newsweek 81 through
17 83.

18 (Exhibit 11 marked for
19 identification.)

20 BY MS. GATES:

21 Q. Does this document -- have you -- do
22 you recognize this?

23 A. Yes.

24 Q. What is this document?

25 A. This is the story that's been in

1 question regarding an ephemeral lake that
2 formed.

3 Q. And this is the full article?

4 A. Yes.

5 Q. Does this refresh your recollection
6 about what the article was about?

7 A. Yes. It's specific to this specific
8 photographer's capture of this lake.

9 Q. Where is that in the article if you
10 can point it out for me?

11 A. If you can scroll down. Right about
12 there. The top there. It starts there and
13 there's two paragraphs based on the
14 photographer's experience and quoting him as
15 well.

16 Q. And you're referring to Newsweek 82,
17 the Bates number?

18 A. I can't see the number, sorry -- oh,
19 yes, there it is. Yes. Correct.

20 Q. So the article talks about the
21 photographer Elliot McGucken's experience. Is
22 that correct?

23 A. Correct. And the capture of these
24 images and posting to Instagram. Hence, like
25 including the Instagram link was relevant.

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1 Q. So does this document refresh your
2 recollection about why this specific photo on
3 Instagram was selected for the article?

4 MR. BURROUGHS: I just object that
5 you're leading your own witness.

6 BY MS. GATES:

7 Q. You can answer.

8 A. Yes, it -- most likely it was
9 started from the San Francisco Gate's piece.
10 It was, probably, inspired the piece about that
11 specific photographer's experience of this
12 lake.

13 Q. And when you refer to the San
14 Francisco Gate piece, what do you mean?

15 A. The quote with which the
16 photographer is included in the story.

17 Q. What is this image on Newsweek 83?

18 A. It's an illustrative image that was
19 included so that it can post to social media.
20 We can't use embedded images for social media
21 purposes. So this image was illustrative of
22 the area and you can see the date on it, it's
23 from a previous formation.

24 Q. So this image is from Getty?

25 A. Yes. Correct. Correct.

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1 Q. And of the images in the article, do
2 you know which image would have been the -- I
3 believe the term was hero image or lead image?

4 A. Usually the first image that's
5 visible is considered the hero. That's a
6 video.

7 Q. So would the hero image in this
8 instance be of the Getty image?

9 A. No, the first image that's visual is
10 the Instagram image.

11 Q. Okay. Do you recall if this story
12 was popular at the time?

13 A. Not particularly. At least in terms
14 of the amount of views that this story
15 received. I believe there were other stories
16 based off of this specific instance.

17 Q. My apologies. I think my Zoom froze
18 there a bit, so I may have missed the end of
19 your answer?

20 A. The last bit I said was that there
21 were other stories, I believe, that other
22 organizations may have done on this specific
23 experience.

24 MS. GATES: Okay. I think that may
25 be it for our questions subject to potential

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1 redirect if you have any further questions.

2 You're muted.

3 MR. BURROUGHS: Let's put Exhibit 11
4 back on the screen, please.

5 MS. GATES: Is that for me?

6 MR. BURROUGHS: Yes, Ms. Gates. Do
7 you mind putting the exhibit back on the
8 screen?

9

10 EXAMINATION

11 BY MR. BURROUGHS:

12 Q. Okay. Ms. Rice, in response to your
13 attorney's questions, you provided some
14 testimony about the context or creation of this
15 article, correct?

16 A. Correct.

17 Q. And that testimony was based
18 entirely on speculation and guesswork, correct?

19 A. I can't assume to know what the
20 photographer was thinking, but there are
21 indications that that may have been the case.

22 Q. Okay. So to the extent that you
23 testified regarding the substance of this
24 article, that was based on your own feelings,
25 your own assumptions, and your own take,

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1 correct?

2 MS. WOLFF: Objection.

3 MS. GATES: Objection.

4 A. It's my interpretation.

5 Q. That's not based in any way on
6 records or conversations with the writer or
7 being there and involved in the article at the
8 time, correct?

9 A. Correct. James might have further
10 insight that he could provide.

11 Q. And looking at Exhibit 11, does it
12 refresh your recollection as to whether or not
13 Newsweek ran advertisements alongside
14 Mr. McGucken's photograph?

15 And if I can ask Ms. Gates to slowly
16 scroll through Exhibit 11. I'd like you to
17 count for me the number of advertisements that
18 you see on the piece. If you can go down a
19 little bit further. Okay.

20 Okay. So scroll back up to the
21 McGucken photograph? Do you see an
22 advertisement for what appears to be Frozen
23 directly adjacent to Mr. McGucken's photograph?

24 A. Yes.

25 Q. Okay. Would that have been a

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1 paid-for advertisement?

2 A. I don't know how our ads work, but I
3 would assume so. I should also add that
4 there's two versions -- this is what the
5 standard view would be.

6 Q. What would be the other version?

7 A. What I can see on my end. My
8 perception is not with ads since I'm an admin.

9 Q. I see. So when you see the post,
10 it's in admin mode. That's a copy of the site
11 without ads?

12 A. Correct. Because once before --
13 when it's not live, there's no ads.

14 Q. And so the admin view does have a
15 copy of the McGucken photograph on it?

16 A. Not anymore it doesn't. It's been
17 removed.

18 Q. And you testified that there were
19 other stories about this particular instance
20 that did better. Do you recall that?

21 A. I don't know if they did better. I
22 just know there were other stories about this
23 on other websites.

24 Q. What other websites?

25 A. At least the one that's referenced

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1 by the photographer, San Francisco Gate, I
2 believe, or SFGATE.

3 Q. Okay. Do you know if that
4 particular publication obtained a license from
5 Mr. McGucken to use the work?

6 A. I wouldn't know what the process is.

7 Q. Do you know if the writer of this
8 Newsweek piece copied content from that article
9 as well?

10 A. I don't know how she generated the
11 story, but she had her own sources.

12 Q. Do you know if the Newsweek author
13 that wrote this story copied McGucken's quotes
14 from the SFGATE article?

15 A. I believe so, but that's standard
16 practice. It's not unusual as long as there's
17 a source to where the quote came from.

18 Q. Do you know if the Newsweek writer
19 reached out to Mr. McGucken for any quote for
20 this article?

21 A. You're aware of the communications
22 I'm aware of.

23 Q. Okay. So as far as you know, she
24 did not reach out to Mr. McGucken for quotes,
25 correct?

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1 A. Had he responded, she probably would
2 have requested quotes.

3 Q. And why do you say that?

4 A. Because that's journalistic
5 practice, so I imagine she would have liked the
6 original quote.

7 Q. Again, like your testimony about the
8 context and creation of the article, you're
9 purely speculating, correct?

10 A. I'm speaking of a standard practice.

11 Q. Any other basis?

12 A. No.

13 Q. And you said that other stories
14 performed better than your Newsweek story. How
15 do you know that?

16 A. I don't know if other stories
17 performed better. I don't -- if I said that,
18 it's not what I was implying.

19 Q. Okay. Other than potentially that,
20 is there any other statements that you made
21 today that you feel are false or perjurious?

22 MS. GATES: Objection.

23 A. I didn't make any false statements.

24 Q. So as you sit here today, you don't
25 know whether or not these other stories you

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1 referenced did that, correct?

2 A. I have no way of knowing that.

3 MR. BURROUGHS: All right. I have
4 nothing further. Unless you guys have any
5 other questions, Ms. Gates, Ms. Wolff.

6 MS. GATES: Nothing further.

7 MR. BURROUGHS: Okay. Then we can
8 relieve the court reporter of her duties under
9 the Code and go off the record.

10 [Reporter requested direction in
11 handling the read and sign.]

12 MS. GATES: You can send it to me
13 and I can make sure it's directed to the proper
14 party.

15 THE REPORTER: Would you like a copy
16 of the transcript?

17 MS. GATES: Yes.

18 MR. BURROUGHS: And to the extent
19 that, Ms. Gates, you're going to be ordering a
20 copy, do you want to agree that that copy can
21 be the one reviewed by your client to make any
22 revisions, and if she's going to make any
23 revisions, she do so within 30 days of your
24 receipt, and if there are no revisions in that
25 time period, we'll agree that the transcript

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1 will stand as constituted when sent?

2 MS. GATES: My apologies. Our Zoom
3 froze, so I did not catch most of what you said
4 there. If you could just repeat it.

5 MR. BURROUGHS: No problem. You're
6 going to be getting a copy of the transcript,
7 right, per your order. You want to use that as
8 the copy that your client will review to make
9 revisions? If she has any revisions, that
10 she'll send those to us in 30 days by e-mail.
11 If she doesn't send any revisions in that
12 period of time, we'll agree that the transcript
13 stands as constituted when sent.

14 MS. GATES: We can agree to do it by
15 e-mail.

16 MR. BURROUGHS: Great. All right.
17 So the original will come to my office. The
18 copy will go to Ms. Gates for revisions and
19 we'll go from there.

20 MS. GATES: And one more thing
21 regarding the confidentiality designation. I
22 know the protective order allows for us to
23 designate portions of the transcript as
24 confidential up to 30 days out. Since I
25 believe most of the exhibits were marked as

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1 confidential and I would assume the testimony
2 would relate to same, we'd like to just go
3 ahead and designate the transcript as
4 confidential and we can clean up anything later
5 within that 30-day period.

6 MR. BURROUGHS: We can't agree to a
7 blanket designation, but send us the lines and
8 certainly if it's really sensitive information,
9 we'll agree to that.

10 MS. GATES: Yeah, happy to do that.
11 I just wanted to put in that placeholder for
12 now because I believe the protective order
13 considers the transcript as confidential during
14 that 30-day period as we are going over the
15 specific portions.

16 MR. BURROUGHS: All right. Thanks,
17 everyone. Take care. We'll see you tomorrow.

18
19 (Whereupon, the proceeding is then
20 concluded at 5:22 p.m.)
21
22
23
24
25

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1 STATE OF _____)
2 COUNTY OF _____) ss.
3
4
5
6

7 I, the undersigned, declare under penalty of
8 perjury that I have read the foregoing transcript,
9 and I have made any corrections, additions, or
10 deletions that I was desirous of making; that the
11 foregoing is a true and correct transcript of my
12 testimony contained therein.

13 EXECUTED this _____ day of _____,
14 20_____, at _____, _____.
15 (City) (State)
16
17
18
19
20

21 _____
22 Diane Rice
23
24
25

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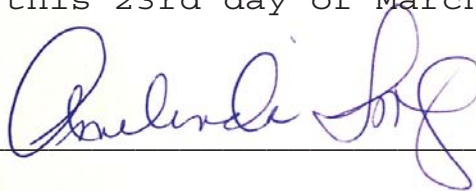
C E R T I F I C A T I O N

I, AMELINDA LOPEZ, a Certified Court Reporter, Registered Professional Reporter, and Notary Public of the State of New Jersey, certify that the foregoing is a true and accurate transcript of the testimony at the time and the date hereinbefore set forth.

I further certify that I am neither attorney nor counsel for, nor related to or employed by any of the parties to the action in which the testimony was taken; and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor am I financially interested in the action.

Signature reserved.

Dated this 23rd day of March, 2021.

A handwritten signature in blue ink, appearing to read 'Amelinda Lopez', is written over a horizontal line.

AMELINDA LOPEZ, CCR, RPR
Certified Court Reporter & Notary Public
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